85-331

Supreme Court, U.S.
FILED
AUG 29 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1985

THOMAS ISRAEL and
WISCONSIN ATTORNEY GENERAL,
Petitioners,

v.

ROBERT WALBERG,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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26 pp

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QUESTION PRESENTED

Whether, in resolving a Sixth Amendment claim of ineffective assistance of counsel caused by pretrial judicial misconduct, a court complies with *Strickland v. Washington*, 104 S. Ct. 2052, *reh'g denied*, 104 S. Ct. 3562 (1984), and *United States v. Cronic*, 104 S. Ct. 2039 (1984), when it relieves the defendant of his obligation to prove specific acts or omissions of counsel, and precludes the prosecutor from proving harmless error.

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1) *Walberg v. Israel*, No. 84-2435 (7th Cir. July 1, 1985) (slip opinion) (not yet reported) (Pet-Ap. 101-14);

2) *Walberg v. Israel*, 587 F. Supp. 1476 (E.D. Wis. 1984) (Pet-Ap. 115-23);

3) *State v. Walberg*, 109 Wis. 2d 96, 325 N.W.2d 687 (1982) (Pet-Ap. 124-39);

4) *State v. Walberg*, 105 Wis. 2d 764, 318 N.W.2d 23 (Ct. App. 1981) (table) (unpublished opinion) (Pet-Ap. 140-43).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on July 1, 1985, and this petition for certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 6:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment 14:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 28:

> **§ 2254....**
>
> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

On June 23, 1978, a jury in Milwaukee County Circuit Court convicted defendant Robert Walberg on two burglary-related felony counts, each enhanced by Walberg's status as a habitual criminal. "[T]he evidence of Walberg's guilt was overwhelming — one of the people who lived in the apartment that Walberg burgled was in the apartment at the time and identified Walberg, who moreover admitted his participation in the burglary to the police (and the admission was in evidence)."[1]/ Other evidence consisted of the tenant's description of the

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[1]/ *Walberg v. Israel*, No. 84-2435, slip op. at 5-6 (7th Cir. July 1, 1985) (Pet-Ap. 105-06).

automobile (including the license plate number) in which Walberg and his colleague escaped[2]/ and a black vinyl gym-type bag marked "R. Walberg" that the tenant had seen in the apartment when he confronted the two burglars.[3]/ Walberg's defense "consisted entirely of [Walberg's] testimony in which he stated that he was present at the burglary scene but did not realize a burglary was in process."[4]/ Milwaukee County Circuit Court Judge Christ T. Seraphim, who presided at pretrial and trial proceedings, sentenced Walberg to two consecutive terms of fourteen years in prison on each count. Each sentence included five years for habitual criminality.

Rather than appeal his conviction directly, Walberg sought collateral relief in accordance with Wisconsin law.[5]/ On March 10, 1981, Milwaukee County Circuit Court Judge Robert W. Landry held a hearing on Walberg's post-conviction motion. At the hearing's conclusion, he orally denied Walberg's motion.[6]/ A written order was entered on March 25, 1981. In an unpublished opinion, the Wisconsin Court of Appeals affirmed Judge Landry.[7]/ The Wisconsin Supreme Court granted Walberg's petition for review and affirmed the court of appeals.[8]/

On March 8, 1983, in the United States District Court for the Eastern District of Wisconsin, Walberg filed a

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[2]/Answer to Petition for Writ of Habeas Corpus, Exhibit O, pages 227-29. Subsequent references to the Answer will be designated by "Answer" [Exhibit]:[page]."

[3]/Answer O:231-32.

[4]/*Walberg*, 109 Wis. 2d at 111, 325 N.W.2d at 695 (Pet-Ap. 139).

[5]/Wis. Stat. § 974.06 (1977).

[6]/Answer P:21, *reprinted at* Pet-Ap. 187.

[7]/Answer K:101-06, *reprinted at* Pet-Ap. 140-43.

[8]/*State v. Walberg*, 109 Wis. 2d 96, 325 N.W.2d 687 (1982) (Pet-Ap. 124-39).

petition for a writ of *habeas corpus* under 28 U.S.C. § 2254. Neither Walberg nor respondent Thomas Israel, the warden of the correctional facility in which Walberg is incarcerated, and respondent Wisconsin Attorney General requested a hearing on the petition. Following submission of briefs, United States District Court Judge Terence T. Evans denied the petition.[9]/

Walberg appealed to the United States Court of Appeals for the Seventh Circuit. With one judge dissenting, the court reversed the district court and granted Walberg a new trial.[10]/

Walberg's *habeas* relief arose from his claim that misconduct by Judge Seraphim deprived him of effective assistance of counsel and an unbiased judge. Walberg has never claimed that Judge Seraphim conducted himself improperly at the trial.[11]/ Rather, he has asserted only that misconduct by Judge Seraphim during two pretrial hearings may have chilled the performance of Walberg's defense counsel, Donald Clark, resulting in ineffective assistance of counsel.[12]/ Judge Seraphim's

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[9]/ *Walberg v. Israel*, 587 F. Supp. 1476 (E.D. Wis. 1984) (Pet-Ap. 115-23).

[10]/ *Walberg v. Israel*, No. 84-2435 (7th Cir. July 1, 1985) (slip op.) (not yet reported) (Pet-Ap. 101-14).

[11]/ *Walberg*, 109 Wis. 2d at 109, 325 N.W.2d at 694 (Pet-Ap. 137) ("[T]here is no claim of error during the trial.... The parties agree that there was no misconduct on the part of Judge Seraphim *at trial* to support the allegation that the defendant was denied his rights to effective assistance of counsel and an impartial judge" (emphasis in original)).

[12]/ *Id.* The Wisconsin Supreme Court found "nothing in the record to support [Walberg's] contentions." *Id.* at 110, 325 N.W.2d at 694 (Pet-Ap. 138); *see generally id.* at 110-11, 325 N.W.2d at 694-95 (Pet-Ap. 138-39). *See also Walberg*, 587 F. Supp. at 1479-80 (Pet-Ap. 120). The Seventh Circuit did not disagree with the fact findings of either the Wisconsin Supreme Court or the Eastern District of Wisconsin. *Walberg*, slip op. at 10 (Pet-Ap. 110).

misconduct occurred during a pretrial hearing on March 6, 1978, held to address several defense motions (including one for a change of venue and another to suppress evidence), and at another pretrial hearing on June 19, 1978, held to deal with developments arising out of the motion for a change of venue.

At the March 6 hearing, Judge Seraphim made pointed comments about the tactics of Walberg's attorney; comments expressing exasperation with inconsistency in some prosecution witnesses' testimony;[13]/ and comments allegedly ridiculing Walberg's testimony. Judge Seraphim's remarks generally reflected irritation with the unnecessarily long time taken to address the motions,[14]/ delay he felt resulted principally from the defense attorney's tactics (including motions the district court decision described as "caviling"[15]/).

The Seventh Circuit specifically noted Judge Seraphim's remark that Walberg's counsel would prefer not to have anyone arrested.[16]/ The court also noted Judge Seraphim's anticipatory responses to Clark's questions to Walberg,[17]/ which occurred after Walberg repeatedly contradicted the testimony of five police officers who had been sequestered during the hearing, and Judge Seraphim's obvious incredulity at Walberg's assertion that he

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[13]/Answer O:85, Pet-Ap. at 160. The Seventh Circuit's decision noted in connection with these remarks that Judge Seraphim had earlier granted a sequestration motion made by the prosecutor. *Walberg*, slip op. at 3 (Pet-Ap. 103). The sequestration motion actually came from Walberg's attorney, not from the prosecutor. *See* Answer O:27.

[14]/*See, e.g.*, Answer O:147, Pet-Ap. at 164.

[15]/*Walberg*, 587 F. Supp. at 1481 (Pet-Ap. 123).

[16]/*Walberg*, slip op. at 3 (Pet-Ap. 103). For the full colloquy leading to this remark, *see* Answer O:130-31.

[17]/*Walberg*, slip op. at 3-4 (Pet-Ap. 103-04).

had been denied a request to use the bathroom.[18]/ Other instances of Judge Seraphim's blunt style in this hearing are reprinted at pages 145-70 of petitioners' Appendix.[19]/

The hearing on June 19 concerned Walberg's motion to change venue, which Judge Seraphim had not yet granted. Richard Klinkowitz, the assistant district attorney prosecuting Walberg, informed Judge Seraphim that a Wisconsin Supreme Court justice would probably order the trial stayed until the change of venue problem could be litigated. Klinkowitz then asked Judge Seraphim to move the trial to another county. Judge Seraphim reluctantly agreed and directed Klinkowitz to call the court administrator and make arrangements for another court. The court recessed at that point.

When the judge and counsel returned from the recess, Walberg's attorney addressed the court:

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[18]/*See* Answer O:134:

Q [by Mr. Clark] To whom did you make that request [to use the restroom]?

A [by Mr. Walberg] I made it as soon as we got to the Safety Building. I made it coming up the hall. I was left alone with a uniformed officer for a good half hour.

THE COURT: Do you believe that, that they would deny him to go to the restroom, do you actually believe that, Mr. Clark, that a prisoner in Milwaukee, Wisconsin, 1978, do you really believe that, or do you really want me to believe that?

THE WITNESS: I was told, "In a little while when we get to you."

THE COURT: Mr. Walberg — I won't say it. Continue.

[19]/In denying Walberg's post-conviction motion in state court, Milwaukee County Circuit Court Judge Robert W. Landry noted the relationship between Walberg's complaint and Judge Seraphim's personal style:

THE COURT: ...

... [I]t is well known that Judge Chris [*sic*] Seraphim,

MR. CLARK: Your Honor, I also have a motion.

THE COURT: What is your motion?

MR. CLARK: Your Honor, *based on the events of this morning,* I filed a motion with the Court and would move Your Honor to recuse himself as the trial judge in this matter and refer this matter back to the Clerk of Circuit Court for reassignment.

If Your Honor may recall, there was an exchange of words. Words were said by the Court to defense counsel in this matter, and particular, the Court's final statement to myself, which I wrote down immediately, was, "I am going to fix you on the trial of this case."[20/]

Clark's statement prompted the following colloquy (reprinted here in full):

THE COURT: There was more than that, sir. This trial in this case, if I may use the vernacular, horsing this case around, we are going to try this case. I am not going to recuse

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in fact, resorted to this technique [*i.e.*, vigorous criticism of trial lawyers] to speed up cases in his court, and in fact it resulted in his trying cases in a fraction of the time that it took many of the rest of us to try cases.

He was very outspoken when it came to dealing with attorneys in his courtroom.

Answer P:17, Pet-Ap. 184-85. *See also* Answer O:161, Pet-Ap. 181 (Judge Seraphim: "[T]he way the Court handled the situation is the way I handled every attorney for eighteen years who has acted up in my court, friend or foe"). Judge Seraphim's demeanor yielded "more than 100 cases" over the years seeking reversal on grounds of judicial misconduct. *In Matter of Complaint Against Seraphim,* 97 Wis. 2d 485, 511, 294 N.W.2d 485, 499 (1980).

[20/]Answer N:4-5, Pet-Ap. 174 (emphasis added). In his Seventh Circuit brief, Walberg described Judge Seraphim's June 19 comment as occurring "[s]hortly after" (p. 14) the judge's remarks made on March 6 and as related to events occurring before June 19.

myself. I have now made arrangements, Mr. Clark, and I am ashamed of you, the man who came to me and asked me to put him in a law office, which I did, when you were a lawyer, and I did which you thank me for. I put you, when you graduated, into the District Attorney's Office and kept you there when you came and asked me that, and I had you in the District Attorney's Office. I have appointed you in this case. I'm a good friend of your mother's, a good friend of your sister's, and I was a good friend of your father's.

MR. CLARK: I appreciate —

THE COURT: Just let me finish, sir. It is that attitude, sir, that attitude, sir, that is going to get you nowhere in the Courts of Milwaukee as long as I'm around.

I will show no prejudice to this defendant. He's going to get a fair trial. The best thing that can happen to this defendant is that if I do not give him a fair trial, because this case will probably never be tried again if I make a mistake. I'm not going to make a mistake. This case is going to be tried. It's going to be tried three days from now, Mr. Clark.

Your motion is denied. This case will be tried on Thursday morning at 9:00 o'clock in Fond du Lac County in Judge Murphy's courtroom.

MR. CLARK: May I make an offer of proof, Your Honor?

THE COURT: You are going to try this case, Mr. Clark.

MR. CLARK: Okay, Your Honor. I wish —

THE COURT: I have no prejudice against

you except the methods that certain lawyers use, that you have used, that I disapprove of. I have no personal personal [*sic*] prejudice against you. Now, this — you know I'm a hard line judge on these matters. I want to see my cases tried. I will — the record will speak for itself as to whether I will hold prejudice against you.

MR. CLARK: I understand that, Your Honor. For the record, I would like to inform Your Honor and Mr. Klinkowitz that I will be going to the Supreme Court to seek an order to show case [*sic*] and a restraining order against Your Honor, and also, rather, a writ of prohibition, mandamus or habeus [*sic*] corpus or what other relief may be —

THE COURT: Can't you name a few more, Mr. Clark? Mr. Clark, I personally — and I will put this on the record — am very ashamed of your conduct in this case, because you don't want Mr. Walberg tried, do you? Do you? I'm asking you a question.

MR. CLARK: Well, Your Honor, I'm —

THE COURT: You asked me to give you a change of venue, and I did. Do you want Mr. Walberg to get a trial?

MR. CLARK: I would like him to get a fair and impartial trial.

THE COURT: Well, you are going to get one, but not if you keep bringing motions, I will tell you this. I'm not going — don't ever come to me with your bill on this thing, because I am not going to pay for all these motions that you are bringing up in the Supreme Court. I am not going to pay for them because I think they are unnecessary. I will tell you now.

MR. CLARK: Well, I have a duty to bring them, Judge.

THE COURT: You have no duty to bring them. Every lawyer can say that about any motion he brings. "I'm defending my client."

Do you wish to say anything for the record, Mr. Klinkowitz, to clear up this colloquy between lawyer and Judge at the side bar when he came up and said, "Did you speak to the Judge," which was an insult to the Court. The District Attorney had not made any comments to me at all. He didn't even talk to me today.

MR. KLINKOWITZ: Judge, I —

THE COURT: And it was an insult to this Court what you did, suggesting that the District Attorney had conferred privately with the Judge without you being present.

MR. CLARK: Your Honor, I asked him directly to his face off the record on the side.

THE COURT: And my statements were off the record. I said them to you off the bench, and for you to say that I am prejudice [*sic*] against you and that this man can't get a fair trial is an abominable lie.

MR. KLINKOWITZ: Judge, if I may, I would only like to say this: That the question that the Court has alluded to was asked of me by Mr. Clark. I had not seen this Court in any capacity for two weeks having just returned from two weeks off, because of military obligations. The only time I had seen this Court today was when the Court was on the bench.

THE COURT: Of course.

MR. KLINKOWITZ: I had no conferences with you, nor to my knowledge did anyone from the District Attorney's Office.

THE COURT: No, but Mr. Clark evidently is going to practice law this way, if he doesn't get his way, that there is some conspiracy between the prosecutor and Judge and heaven knows who else.

Now, you be ready for trial Thursday morning. No Supreme Court, I'll assure you, is going to grant you [*sic*] motion on this, and you better be ready to finish this trial in two days, because it is a simple burglary.[21]/

After discussion about adjourning to another day, Judge Seraphim concluded the hearing with the following comment:

THE COURT: I will assure you of one other thing. Might as well put everything on the record, because this Court always speaks his mind. I will never waste the taxpayers' money again. I assure you.[22]/

On June 21, before resuming the adjourned hearing and with all counsel present, Judge Seraphim addressed once more the events of June 19. The relevant portion of the June 21 transcript appears at pages 179-81 of petitioners' Appendix.

Based on Judge Seraphim's conduct at these pretrial hearings (especially at the June 19 proceeding), Walberg claimed that he had been denied effective assistance of counsel and an unbiased judge.

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[21]/Answer N:5-9, Pet-Ap. 174-77. The transcript of the full June 19 hearing appears at pages 171-78 of petitioners' Appendix.

[22]/Answer N:10, Pet-Ap. 178.

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S DECISION REPRESENTS A SIGNIFICANT AND UNWARRANTED DEPARTURE FROM THIS COURT'S DECISIONS IN *STRICKLAND* AND *CRONIC*.

The Seventh Circuit's decision deserves review for two reasons. First, the decision creates a new *per se* standard — governmental rectitude — for evaluating Sixth Amendment ineffective-assistance-of-counsel claims. The Seventh Circuit's test grants relief based on judicial misconduct without requiring any showing by the defendant that the misconduct actually affected defense counsel's performance. The decision thus imports a Fourth Amendment "exclusionary rule"-type analysis into Sixth Amendment doctrine: the defendant goes free because the magistrate blundered, not because defense counsel failed to perform adequately or because the defendant failed to receive a fair trial. This Court's decisions have never implied support for severing the link between the error claimed by defendant and review both of defense counsel's actual performance and of the fairness of the trial overall.

Second, the Seventh Circuit's decision significantly departs from existing Sixth Amendment ineffectiveness-of-counsel doctrine by presuming the existence of prejudicial ineffectiveness based solely on pretrial judicial misconduct and then precluding analysis for harmless error. Specifically, the Seventh Circuit's decision categorized Walberg's claim as one of ineffective assistance of counsel because of state interference. *Walberg*, slip op. at 9-10 (Pet-Ap. 109-10). *Strickland v. Washington*, 104 S. Ct. 2052, 2067, *reh'g denied*, 104 S. Ct. 3562 (1984); *United States v. Cronic*, 104 S. Ct. 2039, 2047 & n.25 (1984). The court granted *habeas* relief by inferring prejudicial and harmful ineffectiveness even though all judicial miscon-

duct occurred at pretrial proceedings outside the presence of Walberg's jury; "there is no evidence or even the contention by [Walberg], that the jury which convicted [him] was in any way influenced by the conduct of the trial court," *Walberg*, 109 Wis. 2d at 110, 325 N.W.2d at 694 (Pet-Ap. 138); "Judge Seraphim did not misbehave during the trial," *Walberg*, slip op. at 5 (Pet-Ap. 105); "there is no proof that [Walberg's attorney] pulled his punches at trial," *id.* at 7 (Pet-Ap. 107); "there is no evidence in the record" that Walberg's attorney was chilled in his representation during pretrial or trial proceedings, *Walberg*, 109 Wis. 2d at 109-10, 325 N.W.2d at 694 (Pet-Ap.137-38); and "the evidence of Walberg's guilt was overwhelming," *Walberg*, slip op. at 5 (Pet-Ap. 105). Except for absolute denials of counsel, absolute prevention of assistance during a critical stage of a criminal proceeding, or compulsory representation of conflicting interests, this Court has not endorsed a rule of presumptively prejudical ineffectiveness or of *per se* harm flowing from error arising only at pretrial stages.

II. THE SEVENTH CIRCUIT'S DECISION APPLIES TO A SIXTH AMENDMENT INEFFECTIVE-ASSISTANCE-OF-COUNSEL CLAIM A "GOVERNMENTAL RECTITUDE" ANALYSIS THAT EXAMINES ONLY THE GOVERNMENT AGENT'S CONDUCT AND IGNORES THE ACTUAL EFFECT THE AGENT'S CONDUCT HAS ON DEFENSE COUNSEL'S PERFORMANCE AT TRIAL, THUS EFFECTIVELY IMPORTING AN ANALOGUE OF THE FOURTH AMENDMENT "EXCLUSIONARY RULE" INTO SIXTH AMENDMENT DECISION MAKING.

The Seventh Circuit's decision divorces the pretrial "state interference" allegedly causing ineffective assistance from any evaluation of the actual effect the interference had on counsel's representation or on the fairness of the trial. Consequently, "even if the lawyer's actual performance was flawless," *Cronic*, 104 S. Ct. at 2043, the Seventh Circuit's test requires reversal and a new trial simply because a judge exhibits inappropriate testiness. Thus, the defendant obtains relief merely because the magistrate blundered, even though (as here) the defendant makes no claim that the blunder actually had *any* effect on the fairness of his trial.

This Court's precedents neither support — nor imply support for — such exclusionary analysis under the Sixth Amendment. Under *Strickland*, 104 S. Ct. 2052,

> [a] convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function ... is to make the adversarial testing process work in the particular case.

Id. at 2066. *Cf. Cronic*, 104 S. Ct. at 2043 (Court of Appeals erred in utilizing inferential test ignoring counsel's actual performance and fairness of trial).

A "state interference" claim burdens the defendant with only one new element under the *Strickland* "performance" test: identification of state conduct that may result in ineffective assistance. Except when the state absolutely denies counsel or absolutely prevents counsel from exercising independent judgment, *Cronic*, 104 S. Ct.

at 2047 n.25, mere identification and proof of such state conduct does not relieve the defendant from linking the state's conduct with specifically identified "acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment," *Strickland*, 104 S. Ct. at 2066.

Here, Walberg identified specific state conduct — "the angry and injudicious manner in which Judge Christ T. Seraphim ... conducted himself ... in the pretrial phase of the case," *Walberg*, slip op. at 3 (Pet-Ap. 103) —that allegedly caused ineffective assistance. He did not, however, identify any acts or omissions of defense counsel; rather, he claimed that Judge Seraphim's conduct *might* have inhibited defense counsel's performance in some unspecified way and, in effect, invited reviewing courts to infer the existence of a chill from Judge Seraphim's "intemperate and improper courtroom conduct," *Walberg*, 587 F. Supp. at 1477 (Pet-Ap. 116).

A unanimous Wisconsin Supreme Court refused to speculate about acts or omissions Walberg could not — or would not — identify, and it emphatically rejected any notion that Judge Seraphim in fact inhibited defense counsel's performance. *Walberg*, 109 Wis. 2d at 110, 325 N.W.2d at 694 (Pet-Ap. 138). *See also Walberg*, 587 F. Supp. at 1479-80 (Pet-Ap. 120).[23/]

The Seventh Circuit, however, accepted Walberg's claim that the mere possibility of "chill" — even when defense counsel actually performed effectively — satisfied this *Strickland* requirement. It granted *habeas* relief because "[t]he judge *may* have cowed Walberg's lawyer," *Walberg*, slip op. at 12 (emphasis added) (Pet-Ap. 112).

[23/] *Cf. id.* at 1479 (Pet-Ap. 120) (noting that "defense counsel was given the opportunity to voice his apprehensions about Judge Seraphim's actions, ... and Judge Seraphim was given the opportunity to weigh the allegations. ... Judge Seraphim explained the reasons for his ire and should have put defense counsel's apprehensions to rest. Furthermore, Judge Seraphim's unassailed conduct at trial corroborates his pretrial assurances").

The Seventh Circuit's inferential approach thus relieved Walberg of any obligation to identify specific examples of ineffectiveness — an approach neither *Strickland* nor *Cronic* permits when a defendant actually has counsel present and rendering active assistance. It also ignored the actual effect of the state agent's conduct as revealed by the record as a whole, an evaluation *Cronic* requires when a court proceeds through inference in the absence of either a denial of counsel or a complete "breakdown in the adversarial process," *Cronic*, 104 S. Ct. at 2049.

The Seventh Circuit's exclusive concentration on the trial judge's conduct implicitly invokes Fourth Amendment exclusionary standards for "enforc[ing] ideals of governmental rectitude," *United States v. Leon*, 104 S. Ct. 3405, 3413 (1984) *(quoting United States v. Payner*, 447 U.S. 727, 734 (1980)). This approach substantially departs from established Sixth and Fourteenth Amendment standards for assuring that a defendant received a fair trial. While traditional Fourth Amendment exclusion analysis focuses principally on the propriety of government conduct, this Court has consistently evaluated claimed Sixth Amendment violations by reviewing the actual effect of the state's conduct on defense counsel's performance. *Cf. Strickland*, 104 S. Ct. at 2064 ("The benchmark for judging *any* claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result" (emphasis added)). The Seventh Circuit's decision thus rejects *Strickland*'s "actual impact" approach and applies instead — apparently for the first time — a "governmental rectitude" model traditionally associated with the Fourth Amendment.

This new Sixth Amendment *per se* standard requires review because of its substantial departure from recognized doctrines which this Court and lower federal courts have consistently followed.

III. IN PRECLUDING THE PROSECUTION FROM PROVING THE HARMLESSNESS OF ANY ERROR, THE SEVENTH CIRCUIT'S DECISION SIGNIFICANTLY EXTENDS SIXTH AMENDMENT *PER SE* HARMFULNESS RULES FAR BEYOND THE LIMITS STATED OR IMPLIED IN THIS COURT'S DECISIONS.

The Seventh Circuit's decision recognized that in light of the entire record, "[i]t seems ... that however antically Judge Seraphim behaved in the pretrial proceedings, and however harsh he may have been in his sentencing of Walberg, any error in his conduct of the case was harmless." *Walberg*, slip op. at 6 (Pet-Ap. 106). The court nonetheless precluded harmless error analysis, asserting that "there are limitations to the doctrine of harmless error." *Id.* (Pet-Ap. 106). Although the Seventh Circuit's opinion does not precisely describe the point beyond which harmless error no longer applies to claims of ineffective assistance, analysis for harmless error evidently does not occur "[w]hen the state ... 'interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense,'" *id.* at 9 (Pet-Ap. 109) (*quoting Strickland*, 104 S. Ct. at 2064), and causes an "inept defense," *Walberg*, slip op. at 9 (Pet-Ap. 109).

The Seventh Circuit's assertion that Walberg's case falls outside the harmless-error arena lacks support in this Court's precedents. The cases cited in the portion of *Strickland* on which the Seventh Circuit relied (as well as cases cited in *Cronic*, 104 S. Ct. at 2046-47 & n.25) highlight the Seventh Circuit's sharp departure from the limiting principles found in those decisions. Under the Sixth Amendment, this Court has presumed irrebuttably harmful ineffectiveness in only three settings:

(1) When a defendant has been completely denied counsel at a critical stage of a criminal proceeding, *Geders v. United States*, 425 U.S. 80 (1976) (prohibiting defendant from consulting with counsel during overnight recess); *White v. Maryland*, 373 U.S. 59 (1963) (per curiam) (defendant did not have counsel to assist him at preliminary hearing at which defendant entered guilty plea); *Hamilton v. Alabama*, 368 U.S. 52 (1961) (no counsel at arraignment for a capital offense); *Williams v. Kaiser*, 323 U.S. 471 (1945) (no assistance of counsel at entry of guilty plea);

(2) When the state erects so absolute a barrier to counsel's exercise of independent judgment that even counsel's most vigorous efforts could not circumvent the obstruction, *Herring v. New York*, 422 U.S. 853 (1975) (prohibiting defense counsel from presenting summation at the close of bench trial); *Brooks v. Tennessee*, 406 U.S. 605 (1972) (enforcement of state statute requiring defendant desiring to testify to do so before presenting any other testimony for the defense); *Ferguson v. Georgia*, 365 U.S. 570 (1961) (state statute precluding defendants from testifying under oath and judicial prohibition on counsel assisting defendant in presentation of unsworn statement); or

(3) When a court compels counsel, over objection, to represent at a joint trial codefendants with conflicting interests, *Holloway v. Arkansas*, 435 U.S. 475 (1978).

None of the conditions found in this Court's "*per se* harmful ineffectiveness" cases existed in Walberg's

case.[24]/ Walberg had counsel at all stages of the criminal proceedings. The Seventh Circuit acknowledged that "there is no proof that [Walberg's attorney] pulled his punches at trial" (slip op. at 7; Pet-Ap. 107). Walberg has not claimed any judicial misconduct by Judge Seraphim at trial or claimed that the jury was affected by–or even aware of — Judge Seraphim's pretrial misconduct. Nor has Walberg ever suggested any way in which a new trial with a new defense attorney or new trial judge (or both) holds even a remote hope for a result different from that of his original trial.

In short, no factors in Walberg's case justify precluding harmless-error analysis. In assuming harmfulness *per se* as a result of pretrial injudiciousness, the Seventh Circuit's decision takes harmless-error analysis into territory far beyond the limitations found in this Court's precedents, and it does so without suggesting an identifiable limiting principle of its own. This Court should review the Seventh Circuit's decision to determine for itself whether to permit such an extension.

CONCLUSION

The Seventh Circuit's decision marks a significant and unwarranted departure from Sixth Amendment ineffective-assistance-of-counsel principles set forth or contemplated by this Court's decisions. This Court should grant this petition for *certiorari* and review the Seventh Circuit's decision for consistency with Sixth Amendment and Fourteenth Amendment standards for deciding claims of ineffective assistance of counsel.

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[24]/In circumstances where this Court's precedents would permit a presumption of harmfulness from ineffective assistance, the Seventh Circuit itself recently declined to forgo harmless error analysis. *Siverson v. O'Leary*, 764 F.2d 1208, 1215-21 (7th Cir. 1985) (defense counsel's voluntary absence during jury deliberations and return of verdict was presumptively prejudicial error; appellate court found error harmless beyond a reasonable doubt).

Dated this 28TH day of August, 1985.

Respectfully submitted,

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85-331

Supreme Court, U.S.
FILED
AUG 29 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1985

THOMAS ISRAEL and
WISCONSIN ATTORNEY GENERAL,
Petitioners,

v.

ROBERT WALBERG,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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PETITIONERS' APPENDIX

Pursuant to Rule 21.1(k) of the United States Supreme Court Rules, the following items are reproduced in this appendix:

Decision of United States Court of Appeals for the Seventh Circuit in *Walberg v. Israel,* No. 84-2435 101-114

Decision of United States District Court for the Eastern District of Wisconsin in *Walberg v. Israel,* 587 F. Supp. 1476 115-123

Decision of Wisconsin Supreme Court in *State of Wisconsin v. Walberg,* 109 Wis. 2d 96, 325 N.W.2d 687 124-139

Unpublished Decision of Wisconsin Court of Appeals in *State of Wisconsin v. Walberg,* No. 81-605 140-143

Judgment and Order in *Walberg v. Israel,* No. 84-2435 (7th Cir. July 1, 1985) 144

Excerpts from Transcript of Pretrial Hearing held on March 6, 1978, in Milwaukee County Circuit Court (Seraphim, J., presiding) 145-170

Transcript of Pretrial Hearing held on June 19, 1978, in Milwaukee County Circuit Court (Seraphim, J., presiding) 171-178

Excerpt from Transcript of Pretrial Hearing held on June 21, 1978, in Milwaukee County Circuit Court (Seraphim, J., presiding) 179-181

Excerpt from Transcript of Hearing on Post-Conviction Motion under Wis. Stat. § 974.06 held on March 10, 1981, in Milwaukee County Circuit Court (Landry, J., presiding) 182-187

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-2435

ROBERT WALBERG,

Petitioner-Appellant,

v.

THOMAS ISRAEL,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 83 C 381—Terence T. Evans, *Judge.*

ARGUED FEBRUARY 20, 1985—DECIDED JULY 1, 1985

Before CUDAHY and POSNER, *Circuit Judges*, and BROWN, *Senior District Judge.**

POSNER, *Circuit Judge.* In this habeas corpus proceeding, Robert Walberg, who was convicted of burglary by a jury in a Wisconsin state court and sentenced to 28 years in prison, argues that his federal constitutional rights to effective assistance of counsel and to trial by an unbiased tribunal were violated. The district court disagreed, 587 F. Supp. 1476 (E.D. Wis. 1984), as had the Wisconsin Supreme Court, *State v. Walberg*, 109 Wis. 2d 96, 325 N.W.2d 687 (1982), and denied the petition for habeas corpus.

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* Hon. Wesley E. Brown of the District of Kansas, sitting by designation.

In this court the state argues for the first time that Walberg failed to exhaust his state remedies before seeking federal habeas corpus. The circuits are divided over whether the defense of failure to exhaust state remedies can be waived. See *Purnell v. Missouri Dept. of Corrections*, 753 F.2d 703, 708-10 (8th Cir. 1985); Comment, *State Waiver and Forfeiture of the Exhaustion Requirement in Habeas Corpus Actions*, 50 U. Chi. L. Rev. 354 (1983). *Heirens v. Mizell*, 729 F.2d 449, 457 (7th Cir. 1984), a decision of this court, holds that it can be, although an earlier decision of the court, *Mattes v. Gagnon*, 700 F.2d 1096, 1098 n. 1 (7th Cir. 1983), had implied the contrary. It might seem that whether or not the language of the habeas corpus statute makes exhaustion a precondition to the exercise of federal jurisdiction to decide the merits of the petition (habeas corpus "shall not be granted [to a state prisoner] unless it appears that the applicant has exhausted the remedies available in the courts of the State . . . ," 28 U.S.C. § 2254(b)), considerations of comity and federalism should make a federal court determine on its own initiative whether the petitioner has exhausted his state remedies, even if the state attorney general is less zealous in protecting the prerogatives of his state's courts than he ought to be. The state is not a person; it is a collective; and the state attorney general—normally an elected official—may not be speaking for the whole of state government.

An alternative approach, argued in Judge Higginbotham's concurring opinion in *Felder v. Estelle*, 693 F.2d 549, 545-55 (5th Cir. 1982), and adopted in *McGee v. Estelle*, 722 F.2d 1206, 1212 (5th Cir. 1984) (en banc), is to ask whether the state attorney general is authorized under state law to waive the requirement of exhausting state remedies. The idea behind this approach is that to override the state's own decision on the allocation of state governmental powers would disserve the very interests in comity and federalism on which a rule forbidding waiver would have to rest.

But we need not get deeper into this thicket. Even if the defense of failure to exhaust state remedies cannot be waived, either explicitly or (as here) by being asserted belatedly, we find that Walberg presented to the state courts essentially the same claims he makes in this habeas corpus proceeding, and we therefore conclude that he did exhaust his state remedies and that we must decide the merits of his claims.

Those claims are rooted in the angry and injudicious manner in which Judge Christ T. Seraphim, who presided at Walberg's trial, conducted himself, especially in the pretrial phase of the case. This behavior, similar behavior in other cases, sexual misconduct, and in one case accepting gifts from a litigant, earned Judge Seraphim a three-year suspension by the Wisconsin Supreme Court. See *In re Seraphim*, 97 Wis. 2d 485, 294 N.W.2d 485 (1980). In the present case, his ire was focused on Walberg's lawyer, Donald Clark, whom Judge Seraphim had appointed to defend Walberg, an indigent. During a hearing on a motion to suppress a statement that Walberg had made to the police while in custody, Judge Seraphim became irritated at what he considered Clark's wasting the court's time by asking too many questions and making too many motions and objections in a cause the judge considered unworthy. The judge said to Clark, "if I were to leave it to you the police would never be able to arrest anybody." The judge criticized a prosecution witness at the suppression hearing who unexpectedly gave testimony favorable to the defense, and told the witness that a previous witness had given contrary testimony; yet the judge had granted the prosecutor's motion to separate the witnesses (that is, to exclude all but the testifying witness from the courtroom), so that a witness would not try to mold his testimony to that of a previous witness. The judge ridiculed Walberg's testimony that the police hadn't let him go to the bathroom while he was being interrogated. And here is the end of Clark's examination of Walberg,

where the judge answered the questions before Walberg could do so, to show how predictable his answers were:

> Q While you were being interrogated, Mr. Walberg, were you tired?
>
> THE COURT: Yes.
>
> THE WITNESS: Yes.
>
> THE COURT: Sure.
>
> Q [By Clark] Were you well rested?
>
> THE COURT: No.
>
> THE WITNESS: No.
>
> THE COURT: I know. I can answer those questions, Mr. Clark, as you are asking them. They are obvious answers.
>
> Q [by Clark] What was your mental frame of mind during this interrogation?
>
> THE COURT: Disturbed, worried.
>
> THE WITNESS: No, more disgusted than anything else, Your Honor.
>
> MR. CLARK: Nothing further.

Clark complained that during a recess at a later pretrial hearing Judge Seraphim told him, "I am going to fix you on the trial of this case." This incident (not transcribed) led Clark to move the judge to recuse himself. The judge exploded:

> I have now made arrangements, Mr. Clark, and I am ashamed of you, the man who came to me and asked me to put him in a law office, which I did, . . . and . . . you thank me for. I put you, when you graduated, into the District Attorney's Office and kept you there . . . . I have appointed you in this case. I'm a good friend of your mother's, a good friend of your sister's and I was a good friend of your father's.

The judge added that he would "show no prejudice to this defendant. He's going to get a fair trial." The judge told Walberg he had "no personal personal prejudice against you." Later he repeated that Walberg would get a fair trial— "but not if you [Clark] keep bringing motions, I will tell you this." And he said, "don't ever come to me with your bill on this thing, because I am not going to pay for all these motions [to recuse him] you are bringing up in the Supreme Court." The judge concluded the hearing by saying, "I will never waste the taxpayers' money again. I assure you."

The case proceeded to trial, and when the jury returned guilty verdicts on both counts Judge Seraphim told the jury: "I accept the verdicts, you could have found no other verdict. . . . It's to your credit that you came back as fast as you did with these verdicts." He then imposed sentence on the spot, rejecting Clark's request for a continuance. Although the legislature had recently reduced the maximum sentence for possession of burglar's tools from 10 to 2 years, Judge Seraphim sentenced Walberg (who had committed the crime before the reduction in the maximum sentence) to 9 years on that count, plus 5 years' enhancement because of Walberg's prior criminal record. On the other count, burglary, the judge sentenced Walberg to 9 years plus 5 years' enhancement. The judge made the sentences on the two counts consecutive to each other and to a parole revocation, so that Walberg is facing 31 years in prison, though under Wisconsin law he will be eligible for parole after he has served one year on each of the sentences, and if he behaves himself in prison will be entitled to release (as distinct from merely eligible for parole) in about 14 years.

The sentences were legal, and defensible in light of Walberg's very long record of burglaries; Judge Seraphim did not misbehave during the trial; his animus was directed against Walberg's lawyer rather than against Walberg; and the evidence of Walberg's guilt was overwhelming—one of the people who lived in the apartment

that Walberg burgled was in the apartment at the time and identified Walberg, who moreover admitted his participation in the burglary to the police (and the admission was in evidence). It seems, then, that however antically Judge Seraphim behaved in the pretrial proceedings, and however harsh he may have been in his sentencing of Walberg, any error in his conduct of the case was harmless; and it was on this ground that the Wisconsin Supreme Court held that Walberg's constitutional rights had not been violated.

But there are limitations to the doctrine of harmless error that persuade us that the doctrine cannot be used to deny Walberg the relief that he seeks in this habeas corpus proceeding. If the police, after arresting Walberg and obtaining an eyewitness identification of him plus his confession, had taken him directly to the penitentiary on the ground that a trial would be a waste of time for someone so patently guilty, he would be entitled to release on habeas corpus; he would have been deprived of his liberty without due process of law. The Constitution requires (unless the defendant waives his rights) a certain modicum of adversary procedure even if the outcome is a forgone conclusion because the evidence of guilt is overwhelming. Although the present case is much less extreme than the hypothetical case just put, we think Walberg was so far impeded in his ability to defend himself effectively that he is entitled to a new trial, or to be released if the Wisconsin authorities don't want to retry him, even though his guilt is plain and his sentence was legal. We do not rest this conclusion on grounds of due process, however, we think the state court deprived him of his constitutional right to the assistance of counsel.

Under the public-defender system in force in Wisconsin when Walberg was tried, the trial judge appointed defense counsel for indigents. So lawyer Clark owed his appointment to Judge Seraphim, and in addition had to get Judge Seraphim's approval of his fee for defending Walberg (the record does not reveal whether the judge ever did approve Clark's fee). The judge would also have it

in his power to give, or not to give, Clark a subsequent appointment. Although some lawyers accept appointments to defend indigents purely out of a sense of *noblesse oblige*, or to get experience, rather than out of a desire for a fee, Clark is apparently not one of these lawyers, at least if we may judge from the judge's accusation of ingratitude. After the judge's pretrial outburst Clark knew that he would have to be on his best behavior at trial if he was to have any hope of a subsequent appointment by Judge Seraphim—and perhaps if he was to have any hope of getting paid for defending Walberg. And Judge Seraphim had indicated that good behavior meant not just avoiding unethical conduct but also not pressing too hard, even well within ethical boundaries, in favor of an obviously guilty defendant. Although there is no proof that Clark pulled his punches at trial, he had every incentive to do so. He had a conflict of interest, not between two clients having conflicting defenses but between his client and himself. They had conflicting incentives—Walberg to get off by any means, Clark to preserve so far as possible his relationship with a judge who regarded himself, apparently with some basis, as Clark's benefactor.

Of course it is implicit in any system where trial judges appoint counsel who receive fees—indeed in any system where judges rule on attorney's fees, whether or not the judge appointed counsel—that counsel has an economic incentive to comply with the judge's wishes, and this may at times create a division of loyalties. We do not for a moment suggest that a lawyer appointed under such a system is therefore incapable of representing his client in a constitutionally adequate fashion. But in extreme cases a fatal conflict of interest may arise. Suppose Judge Seraphim had told Clark that if he defended Walberg vigorously he would never get another appointment. Such a threat would entitle Walberg to a new trial regardless of whether a vigorous defense could have gotten him off. The judge did not go quite so far, but he went far. He accused Clark of ingratitude; he made a thinly veiled threat not to approve Clark's fee request at the end of the trial; he

reminded Clark of Clark's dependence on his goodwill. The circumstances made the conflict of interest between Clark and his client too serious to be excused just because Walberg cannot show what more Clark would have done in Walberg's defense. (Walberg could have called Clark to testify as a witness in the habeas corpus proceeding, but did not; so we must assume that he would not have given testimony helpful to Walberg's present claims.)

Although the general rule is that a criminal defendant who claims ineffective assistance of counsel must show not only lack of minimum professional competence but also that the lack probably changed the outcome of his trial, see *Strickland v. Washington*, 104 S. Ct. 2052, 2067-68 (1984), there are important exceptions relating to conflicts of interest. When the defense lawyer is guilty of a conflict of interest to which no objection was made at trial, the defendant, though he must show that the conflict adversely affected the trial, need not show that the trial would probably have come out differently if there had been no conflict. See *id.* at 2067; *Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980). But if an objection had been made, the defendant would be entitled to a new trial even if the conflict of interest had had no effect at all on the trial. See *Holloway v. Arkansas*, 435 U.S. 475, 487-91 (1978). The principle is not limited to cases where the conflict of interest is between clients; it reaches a conflict between the client and the lawyer's personal interests, as well. *Solina v. United States*, 709 F.2d 160, 167-69 (2d Cir. 1983) (Friendly, J.), holds that if the defendant is represented by someone who (unbeknownst to the defendant) is not a lawyer, there is a per se violation of the right to assistance of counsel. See also *United States v. Hoffman*, 733 F.2d 596, 599-600 (9th Cir. 1984) (dictum). With some of the reasoning in Judge Friendly's opinion and perhaps even with the application of the principle he announced to the facts of his case it is possible to differ; but what is significant for present purposes is his suggestion that an imposter lawyer might fear that if he defended his client too vigorously it would draw attention to himself, and he

might be unmasked, see 709 F.2d at 164-65—that there was in short a conflict between the client's and the lawyer's interests. In another Second Circuit case, *United States v. Cancilla*, 725 F.2d 867, 869-71 (2d Cir. 1984), where the defendant's counsel was engaged in criminal conduct similar to what his client was accused of, the court held that the conflict of interest was fatal; no actual impact on the defense had to be shown. No objection had been made at trial—but then the defendant had not known of his lawyer's criminal activities. See also *Government of Virgin Islands v. Zepp*, 748 F.2d 125, 135-39 (3d Cir. 1984).

Clark moved to recuse Judge Seraphim on the ground that "if this case should proceed with Judge Seraphim presiding defendant will be denied the effective assistance of counsel"; and with the judge thus alerted to the conflict, maybe his refusal to recuse himself was reversible error even if harmless, under the cases we have cited. But there is no need to pursue this approach further; no need to decide whether Clark should have done more—should have moved for leave to withdraw as Walberg's counsel—in order to bring the case within the orbit of cases where objection was made to the alleged conflict of interest. Although both parties describe Walberg's claim as one of ineffective assistance of counsel, the description is imprecise. The essence of such a claim, and one of the reasons the courts have made it so difficult for defendants to prevail on it, is that it asks the courts to set aside a conviction not because of any impropriety by the prosecution or the trial court but merely because the defendant's lawyer was not up to snuff. When the state, here in the person of the trial judge, "interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense," *Strickland v. Washington*, *supra*, 104 S. Ct. at 2064, we are in a different ballpark. If the state is not a passive spectator of an inept defense, but a cause of the inept defense, the burden of showing prejudice is lifted. It is not right that the state should be able to say, "sure we impeded your defense —now prove it made a difference." It is enough that Judge

Seraphim by his threats to Clark appreciably reduced the likelihood that Clark would conduct a vigorous defense. Compare *United States v. Cronic*, 104 S. Ct. 2039, 2047 n. 25 (1984); *Geders v. United States*, 425 U.S. 80 (1976); *Herring v. New York*, 422 U.S. 853 (1975); *Siverson v. O'Leary*, No. 84-1270, slip op. at 16 (7th Cir. June 10, 1985). This notion of impedance may, of course, lie behind the refusal to disregard harmless error when the defendant is forced against his will to be jointly represented with other defendants. But whether or not this case fits the precise mold of the *Holloway* case it involves the same policy, one of protecting defendants against gratuitous interference by the judge with their efforts to defend themselves.

From this discussion it should be clear that our conclusion that Walberg was denied his constitutional right to counsel is not based on any disagreement with the factfindings made by the Wisconsin court in rejecting his claim—findings that come to us with a presumption of correctness, see 28 U.S.C. § 2254(d); *Sumner v. Mata*, 449 U.S. 539 (1981)—or by the district court in denying habeas corpus. The disagreement is over whether Walberg's claim must fail because he cannot show how Clark would have defended him differently but for Judge Seraphim's threats. We respectfully suggest that that is the wrong standard.

It is possible but less certain that Walberg was also deprived of a far older right than the right to the effective assistance of counsel—the right to an unbiased judge. Although most cases of bias by trial judges have involved the question whether the judge's bias was likely to influence the jury, that is not an essential element. Even when the biased judge neither is the trier of fact nor is shown to have conveyed his bias to the jury that is the trier of fact, there can be a violation of due process which requires a reversal of the conviction. *United States v. Holland*, 655 F.2d 44, 47 and n. 5 (5th Cir. 1981) (per curiam); *United States v. Brown*, 539 F.2d 467, 468-70 (5th Cir. 1976) (per curiam); cf. *Daye v. Attorney General*, 696

F.2d 186, 197 (2d Cir. 1982) (en banc); *Johnson v. Scully*, 727 F.2d 222, 226 (2d Cir. 1984). This is implicit in cases which hold that a judge who has a pecuniary interest in the outcome of a case cannot preside in the case, whether or not that interest actually affected the outcome. See, e.g., *Brown v. Vance*, 637 F.2d 272, 282 (5th Cir. 1981).

It is true that some of the cases we have cited arise under the statutes that require disqualification of federal judges for bias, prejudice, or conflict of interest. See 28 U.S.C. §§ 144, 455. But insofar as the statutes require recusal for actual bias or prejudice as distinct from a mere appearance of bias or prejudice, see *Margoles v. Johns*, 660 F.2d 291, 296 (7th Cir. 1981) (per curiam) (which incidentally was a civil rather than criminal case), they are declaratory of constitutional requirements. See, e.g., *United States v. Sciuto*, 531 F.2d 842, 845 (7th Cir. 1976); *Knapp v. Kinsey*, 232 F.2d 458, 465 (6th Cir. 1956).

It is also true that the judge's prejudice in this case was directed toward the lawyer rather than the client. But the judge who is so hostile to a lawyer as to doom the client to defeat deprives the client of the right to an impartial tribunal. See, e.g., *Bell v. Chandler*, 569 F.2d 556 (10th Cir. 1978). The reluctance to disqualify a judge on the basis of apparent hostility to a lawyer, a reluctance well illustrated by Judge Friendly's opinion in *Rosen v. Sugarman*, 357 F.2d 794, 797-800 (2d Cir. 1966), reflects the difficulty of distinguishing between unreasoning prejudice and an often well-founded judicial impatience with a lawyer's obstructive tactics. There is of course an element of such impatience here. But Judge Seraphim went far beyond the bounds of permissible criticism of a lawyer's tactics when he accused Clark of personal ingratitude. And he implied, or could be understood to be implying, that he was angry at the lawyer because the client was unworthy of the protracted efforts that the lawyer was making on his behalf. The judge's partiality at the suppression hearing, his bizarre conduct in answering questions put to Walberg before Walberg could answer, his insistence that the defendant's lawyer owed his first

allegiance to the judge as a family friend and benefactor, his congratulating the jury on their speed, and the haste with which he imposed an exceedingly severe sentence, when taken all together, show that Judge Seraphim committed an egregious breach of judicial decorum—more so, for example, than the angry outburst of the judge in *Wilks v. Israel*, 627 F.2d 32, 36-37 (7th Cir. 1980), whom the defendant assaulted. The judge in *Wilks* said, "he is going away for so long they are going to forget that they ever knew him," *id.* at 36, but the provocation was extreme, and the outburst of judicial wrath, which quickly subsided, was an isolated incident in the proceedings.

Yet despite all we have said, we are by no means sure that Judge Seraphim was prejudiced against Walberg. His hostility to Clark may not have lapped over to Walberg; his hostility to Walberg may have reflected no more than a well-founded belief that Walberg was guilty. Our *Margoles* decision, cited earlier, although a civil case, makes us hesitate to hold that a mere appearance of prejudice is enough to overturn a state criminal conviction on federal constitutional grounds—especially since it is not necessary to hold that in this case; there must be a new trial in any event. But Judge Seraphim's indecorous conduct reinforces our earlier conclusion that he prevented Walberg from being effectively represented by counsel. The judge's hostility to Walberg made even more important than is usually the case that Walberg have a vigorous, forthright, aggressive counsel who might appeal to the jury as it were over Judge Seraphim's head. The judge may have cowed Walberg's lawyer.

In judging the fairness of a trial it is sometimes helpful to adopt the vantage point of the defendant and ask whether a rational albeit criminal individual could be persuaded that he had had a fair trial, by which we mean here simply a trial in which an innocent defendant would be reasonably assured of acquittal. We do not think it would be possible to convince Walberg of this even if he were capable of appraising the situation objectively. What

he saw in the dock was that his lawyer got in trouble with the judge because the judge thought his client too obviously guilty to merit such strenuous efforts on his behalf; that after being rebuked for his ingratitude to the judge the lawyer managed at trial to avoid the judge's wrath; that the jury brought in a verdict with great haste for which the jurors received the judge's congratulations; and that the judge proceeded to impose an exceedingly harsh, albeit legal, sentence on him. The appearance was of a judge who had made up his mind at the start that the defendant was guilty and who proceeded to intimidate the defendant's lawyer so that the proceeding could be got over with and Walberg shipped off to prison for many years. Guilty as Walberg undoubtedly is—unworthy a member of the community as he undoubtedly is—he was entitled to a better procedure.

The judgment is reversed with directions to the district court to order Walberg released from custody under the sentences imposed by Judge Seraphim, unless the state brings Walberg to trial within 120 days.

REVERSED WITH DIRECTIONS.

BROWN, Senior District Judge, *Dissenting.*

I must respectfully dissent from the majority opinion because of my belief that the petitioner failed to carry his burden of proof to support his contention that he was denied effective assistance of counsel contrary to his constitutional right to due process of law. 28 U.S.C.A. Sec. 2254(d). My conclusion does not, of course, endorse the conduct of the state trial judge, or excuse his reprehensible behavior in any manner.

I believe that the findings of fact by the Wisconsin court must be accorded a "presumption of correctness" in this habeae corpus case, under the rule of *Summer v. Mata*, 449 U.S. 539, 66 L.Ed. 2d 722, 101 S. Ct. 764 (1981). In the absence of any evidence that the conduct of the judge

affected trial counsel or the jury at the subsequent trial, I believe this presumption must previal.

While I recognize that the decision of this Circuit in *Margoles v. Johns*, 660 F.2d 219 (7 Cir. 1981), *cert. den.*, 455 U.S. 909, involved a civil action, the ruling there is most persuasive that proof, as opposed to speculation, of the denial of due process is required:

> "A litigant is denied the fundamental fairness to which he is constitutionally entitled if the judge of his case is unfairly biased against him. However, a litigant is not denied due process by either the 'appearance' of partiality or by circumstances which might lead one to speculate as to a judge's impariality. A litigant is denied due process if he is *in fact* treated unfairly." 660 F.2d at 296, (emphasis of the court).

Here, I do not believe that speculation or the "appearance" of a denial of due process, should override the findings of the state courts, or the conclusion of the federal district court.

It is to be noted that under the amendment to Rule 52(a), Fed. R. Civ. Proc., to take effect on August 1, 1985, a district court's findings of fact, whether based on oral or documentary evidence, cannot be set aside unless they are found to be clearly erroneous. This rule is in accordance with the Supreme Court's recent ruling in *Anderson v. Bessemer City*, 470 U.S. ____, 84 L.Ed 2d 518, (March 19, 1985).

I would affirm the judgment below.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 50234—Pandick Midwest, Inc., Chicago—7-1-85—450

Robert WALBERG, Petitioner,

v.

Thomas ISRAEL and The Attorney General of the State of Wisconsin, Respondents.

Civ. A. No. 83-C-381.

United States District Court,
E.D. Wisconsin.

June 11, 1984.

[Syllabus and headnotes omitted.]

DECISION and ORDER

TERENCE T. EVANS, District Judge.

Robert Walberg, currently an inmate at the Waupun Correctional Institution, has petitioned for the issuance of a writ of habeas corpus. He contends that the treatment he and the attorney representing him received before Milwaukee Circuit Court Judge Christ T. Seraphim deprived him of his Sixth and Fourteenth Amendment rights. Although I believe that Judge Seraphim's actions during the pretrial proceedings in this case were improper, his conduct of the trial itself did not violate Walberg's right to a fair trial. Accordingly, Walberg's petition for a writ of habeas corpus is denied.

FACTS

The facts upon which Walberg's petition is based were synopsized by the Wisconsin Supreme Court when it reviewed this case. See *State v. Walberg*, 109 Wis.2d 96, 97-101, 325 N.W.2d 687 (1982). These facts, which are undisputed, may be roughly summarized as follows: Walberg was convicted of one count of burglary and one count of possession of burglarious tools, with each count enhanced by a charge of habitual criminality. Before trial, Judge Seraphim conducted a pretrial hearing on

Walberg's motion to suppress a statement which was taken from him at the time of his arrest. During the hearing, Judge Seraphim conducted himself in a way which constituted, according to the Wisconsin Court of Appeals, "intemperate and improper courtroom conduct".

Judge Seraphim's remarks appear to have been spurred by what he considered to be defense counsel's "frivolous" objections and motions. Since Walberg's counsel was appointed, Judge Seraphim was responsible for authorizing his payment of fees. Defense counsel engaged in tactics which were, according to Judge Seraphim, a waste of the taxpayer's money. Judge Seraphim lambasted defense counsel for "running up a bill of $30 an hour."

Furthermore, the judge made remarks which may have revealed an intent to undermine defense counsel's presentation of his motion to suppress. Despite entering a sequestration order, Judge Seraphim openly criticized a prosecution witness who gave evidence favorable to the defense theory, and then informed the witness that a prior witness had given different testimony. During a series of questions inquiring about the conditions under which Walberg gave his statement, Judge Seraphim spontaneously interrupted, interposing his own answers to defense counsel's questions. He went as far in revealing his personal opinion of the case as to refer to an individual arrested with Walberg as "a known burglar who unfortunately isn't going to be tried in this court."

All of this culminated in several remarks which Walberg argues constituted a threat against his defense counsel, the chief one of which was "I'm going to fix you on the trial of this case." (Judge Seraphim recalls differently but acknowledges telling defense counsel "that if he continued his tactics during the trial I was going to take care of him ...".)

Walberg's counsel asked Judge Seraphim to recuse himself but instead Judge Seraphim lashed back, saying:

> [I] am ashamed of you, the man who came to me and asked me to put him in a law office, which I did, when you were a lawyer, and I did which you thanked me for. I put you, when you graduated, in the District Attorney's Office and kept you there when you came and asked me that, and I had you in the District Attorney's Office. I have appointed you in this case. I'm a good friend of your mother's, a good friend of your sister's, and I was a good friend of your father's.... It is that attitude, sir, that attitude, sir, that is going to get you nowhere in the courts of Milwaukee as long as I'm around.

The judge then denied the recusal motion.

Significant, however, is the fact that Judge Seraphim added the following comments to his decision on the recusal motion:

> I will show no prejudice to this defendant. He's going to get a fair trial. The best thing that can happen to this defendant is that if I do not give him a fair trial, because this case will probably never be tried again if I make a mistake. I'm not going to make a mistake.... I have no prejudice against you [defense counsel] except the methods that certain lawyers use, that you have used, that I disapprove of. I have no personal personal [sic] prejudice against you. Now this — you know I'm a hard line judge on these matters. I want to see my cases tried. I will — the record will speak for itself as to whether I will hold prejudice against you.

The record appears to bear out Judge Seraphim's prediction. The case proceeded to the jury with Judge Seraphim presiding. The challenged statement, Walberg's admission that he participated in the burglary, was

introduced in evidence[1]. The jury returned guilty verdicts upon both counts. There was no allegation that Judge Seraphim behaved improperly at trial. Walberg does, however, criticize Judge Seraphim for passing sentence immediately upon receiving the jury verdict. He is also criticized for imposing sentences which nearly reach the maximum allowable for the offenses.

In its consideration of this case, the Wisconsin Supreme Court ruled that Judge Seraphim erred in failing to recuse himself because

> these statements created the appearance that the judge was biased against defense counsel and that this bias was affecting his impartiality to the defendant. The court, in effect, was telling defense counsel he must choose between bringing the motions and obtaining a fair trial for the defendant. He further appeared to be threatening counsel's personal and economic interests if he continued defending his client by bringing motions and voicing objections.

109 Wis.2d at 108-109, 325 N.W.2d 687. However, the Supreme Court declined to reverse Walberg's conviction because it concluded that Judge Seraphim's failure to recuse himself was harmless beyond a reasonable doubt. The Court based its conclusion on these facts: All of the objectionable statements occurred outside the presence of the jury. There was no misconduct at trial which would substantiate a charge that defense counsel was deterred from giving effective assistance to Walberg or that Judge Seraphim had failed to act impartially. Finally, the State's case was founded on strong evidence linking the defendant to the burglary, strong enough that the jury could have easily disbelieved Walberg's defense that he did not realize a burglary was in process.

[1]Walberg's petition does not raise the admission of the statement in evidence as grounds for habeas relief.

DISCUSSION

Walberg's argument in support of his petition for writ of habeas corpus proceeds along two lines: Walberg's chief argument is that Judge Seraphim's remarks revealed a prejudice against Walberg's counsel which forced him to concentrate on protecting his fee and deterred him from providing effective assistance to Walberg, which Walberg is guaranteed by the Sixth Amendment. The second argument is that Judge Seraphim's conduct reflected his bias against Walberg which deprived Walberg of his due process right to a fair trial.

I.

I do not believe that defense counsel's alleged conflict of interest between collecting his fee and zealously defending Walberg was serious enough to constitute a deprivation of Walberg's Sixth Amendment rights. Walberg would have me adopt a principle that whenever a lawyer feels that the filing of motions or the voicing of objections places his fee in jeopardy, a conflict of interest, violative of the Sixth Amendment, occurs.

Conflicts of interest arise from a variety of settings. Courts are most often faced with conflicts created when one defense attorney represents two or more defendants whose individual interests are at odds. The configuration of the conflict which Walberg alleges is somewhat different. Nonetheless, I believe that Walberg's case can be resolved using the conflict of interest analysis generated from multiple representation cases. The alleged conflict between economic interests and Walberg's defense is not unlike a conflict between one defendant's legal interests and a co-defendant's legal interests.

The Supreme Court has made it clear that "a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel."

Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 333 (1980). What *Cuyler* requires is that a defendant who objects to a conflict of interest have the opportunity to show "that potential conflicts impermissibly imperil his right to a fair trial." *Cuyler* at 348, 100 S.Ct. at 1718, *citing Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978).

In this case defense counsel was given the opportunity to voice his apprehensions about Judge Seraphim's actions, the actions which allegedly gave rise to a conflict of interest, and Judge Seraphim was given the opportunity to weigh the allegations. As the transcript of the pretrial hearing quoted above indicates, Judge Seraphim explained the reasons for his ire and should have put defense counsel's apprehensions to rest. Furthermore, Judge Seraphim's unassailed conduct at trial corroborates his pretrial assurances and persuades me that counsel had little reason to worry about his fee.

Beyond that, my review of the pretrial proceedings leads me to concur with the Wisconsin Supreme Court, when it wrote:

> Moreover, there is no evidence in the record that during the pretrial motions the defense attorney's performance was "chilled". The record demonstrates that the defense attorney continued to make motions and voice objections even in the face of repeated criticism by Judge Seraphim. The record is entirely barren of any evidence that Judge Seraphim's conduct in any way affected defense counsel's conduct at any point in the proceedings leading up to conviction and sentencing.

109 Wis.2d at 110, 325 N.W.2d 687.

The conflict in this case was nowhere near as serious as those found in cases raised as analogies by Walberg. In *Messelt v. Alabama*, 595 F.2d 247 (5th Cir. 1979), the

court granted a petition for habeas corpus where a "unique sequence of events" violated the petitioner's due process rights. In *Messelt,* the petitioner's defense attorney cooperated in person with the District Attorney to reindict the petitioner for more serious offenses in order to "provide more incentive for [the petitioner] to secure the necessary funds to pay for his defense". The petitioner later turned on the attorney and served as informer and witness against him. In *United States v. Hurt,* 543 F.2d 162 (D.C.Cir.1976), the petitioner alleged an economic conflict of interest. However, the competing interest was not merely the collection of a fee for services rendered. Rather, the petitioner's appellate counsel had been sued for libel to the tune of $2 million by the petitioner's trial counsel. Appellate counsel was afraid that if he zealously argued that the petitioner was not effectively assisted by trial counsel, he would exacerbate the libel claims which trial counsel had made against him.

II.

Walberg's second argument in support of his petition is that his due process right to a fair trial was violated by Seraphim's bias against him. In ruling on this argument, it is important to observe first that the Wisconsin Supreme Court's finding that it was error for Judge Seraphim to decline to recuse himself is not determinative of this issue. 28 U.S.C. § 2241(c), which empowers federal courts to grant writs of habeas corpus, states that the writ shall not extend unless the petitioner "is in custody *in violation of the Constitution*" (emphasis added). A violation of a duty to recuse arising under state law does not itself amount to a violation of the Constitution.

Instead, as the Court of Appeals for this Circuit, in adopting the opinion of one of the Circuit's district judges has observed:

> A litigant is denied the fundamental fairness to which he is constitutionally entitled if the

> judge of his case is unfairly biased against him. However, a litigant is not denied due process by either the "appearance" of partiality or by circumstances which might lead one to speculate as to a judge's impartiality. A litigant is denied due process if he is *in fact* treated unfairly.

Margoles v. Johns, 660 F.2d 291, 296 (7th Cir. 1981) (emphasis in original), *cert. den.*, 455 U.S. 909, 102 S.Ct. 1256, 71 L.Ed.2d 447 (1982).

In general, the type of conduct which has been found serious enough to violate due process is far more questionable than what took place in this case. Unconstitutionally biased judges are those who have "a direct, personal, substantial, pecuniary interest in reaching a conclusion against [the defendant] in his case". *Tumey v. Ohio*, 273 U.S. 510, 523, 47 S.Ct. 437, 441, 71 L.Ed. 749 (1927), cited in *Barry v. United States*, 528 F.2d 1094, 1099 (7th Cir.), *cert. den.*, 429 U.S. 826, 97 S.Ct. 81, 50 L.Ed.2d 88 (1976). As the Fifth Circuit Court of Appeals has observed in a contempt setting,

> The leading cases ... involved situations where there was actually some incentive to find one way or another, i.e., financial considerations ... or previous participation by the trying judge in the proceedings at which the contempt occurred.

Howell v. Jones, 516 F.2d 53, 57 (5th Cir. 1975), *cert. den.*, 424 U.S. 916, 96 S.Ct. 1116, 47 L.Ed.2d 321 (1976).

The conduct of Judge Seraphim during the pretrial phase of this case has been addressed by Milwaukee Circuit Judge Robert Landry (who succeeded Judge Seraphim and conducted the State post-conviction hearing on Walberg's motion), by Chief Judge John Decker speaking for a unanimous Wisconsin Court of Appeals, and by Chief Judge Bruce Beilfuss speaking for a unanimous Wisconsin Supreme Court. All of the judges and all of the courts have found Judge Seraphim's

conduct during the pretrial phase of this case to be unprofessional. In calling the conduct "intemperate and improper", Judge Decker noted that Judge Seraphim had been punished for his unprofessional conduct in *In re Seraphim,* 97 Wis.2d 485, 294 N.W.2d 485, *cert. den.,* 449 U.S. 994, 101 S.Ct. 531, 66 L.Ed.2d 291 (1980). I can add nothing to the appropriate observations about Judge Seraphim's conduct that have already been made. His performance during the pretrial stages of this case fell short of the mark. No doubt, some of Judge Seraphim's intemperate responses during the pretrial hearings were triggered by the caviling motions presented by Walberg's trial counsel. However, Judges are supposed to be above the fray; they should not get down in the pit and throw the mud. Judge Seraphim failed to discharge his obligations fairly during some of the pretrial portions of this case.

Once the actual jury trial started, Judge Seraphim cleaned up his act and conducted himself properly. He carried out a promise that he would not let his opinion of the defense counsel's pretrial tactics interfere with the processing of the charges against Walberg. As for post-trial matters, the record reveals none of the strife which took place before the trial began. In fact, Judge Seraphim made a point of complimenting defense counsel on the record for "handling himself well." Furthermore, Walberg's fate on sentencing appears related to nothing other than his lengthy career as a burglar. For these reasons, Walberg has not carried his burden of demonstrating that he was *in fact* denied a right to fair trial by Judge Seraphim.

Accordingly, Walberg's petition for writ of habeas corpus is DENIED.

IT IS THEREFORE ORDERED that this case is DISMISSED.

STATE of Wisconsin, Plaintiff-Respondent,

v.

Robert WALBERG, Defendant-Appellant-Petitioner.†

Supreme Court

No. 81-605. Argued October 6, 1982.—Decided November 2, 1982.

(Affirming 105 Wis. 2d 764, 318 N.W.2d 23 (Ct App).)
(Also reported in 325 N.W.2d 687.)

1. **Criminal Law and Procedure § 654.60*—postconviction proceedings—burden of proof.**
In proceeding for postconviction relief, higher civil burden of clear and convincing evidence, rather than fair preponderance standard, applied in view of furthering public policy of finality of judgments after defendant had been given ample opportunity to challenge conviction by direct remedies (Stats § 974.06).

2. **Courts § 75*—judges—recusal—standards.**
Tests for recusal include subjective test based on judge's own determination of impartiality, and objective test based on whether impartiality can reasonably be questioned.

3. **Criminal Law and Procedure § 449*—conduct of judge—recusal—grounds.**
Judge's actions during pretrial motion hearing created appearance of bias against defendant, and thus his failure to recuse himself was error, where judge told defense counsel he must choose between bringing motions and obtaining fair trial for defendant, and where judge further appeared to be threatening counsel's personal economic interests if counsel continued defending his client by bringing motions and voicing objections.

4. **Criminal Law and Procedure § 727*—conduct of judge—harmless error.**
Judge's failure to recuse himself from criminal proceeding was harmless error, where error occurred only during pretrial proceedings, where error was nonprejudicial in that it had no effect on defense attorney's conduct at any point during trial,

† Motion for reconsideration denied, without costs, on January 3, 1983.

* See Callaghan's Wisconsin Digest, same topic and section number.

and where error had no effect on jury's determination of guilt.

REVIEW of a decision of the Court of Appeals. *Affirmed.*

For the defendant-petitioner there were briefs and oral argument by *William J. Tyroler*, assistant state public defender.

For the plaintiff-respondent the cause was argued by *Jerome S. Schmidt*, assistant attorney general, with whom on brief was *Bronson C. La Follette*, attorney general.

BEILFUSS, C.J. This is a review of an unpublished decision of the court of appeals which affirmed the circuit court's order, Judge Robert W. Landry, presiding, denying the defendant's motion for postconviction relief pursuant to sec. 974.06, Stats.

The defendant Robert Walberg, was convicted after a trial by jury of one count of burglary, sec. 943.10(1)(a), Stats. 1977, one count of possession of burglarious tools, sec. 943.12, and habitual criminality, sec. 939.62, as to both counts.[1] Prior to trial, the defendant brought several motions, including a motion to suppress evidence based on an illegal arrest and improper interrogation, and a motion to change venue. On June 19, 1978, the defendant filed a motion requesting that the trial judge, Christ T. Seraphim, recuse himself. The motion was based on the claim that during the motion hearings the judge had shown prejudice and bias in his remarks to defense counsel, to the detriment of the defendant. All the alleged misconduct occurred outside the presence of

[1] Judgment of conviction was entered on June 23, 1978, and sentence was imposed as follows: 14 years on each count, including an enhancement of five years on each charge under sec. 939.62, Stats., consecutive to each other and consecutive to a sentence on parole revocation.

the jury. Judge Seraphim refused to recuse himself, disclaiming any prejudice, and presided at the trial.

Following the trial and conviction the defendant did not appeal but subsequently brought a motion to vacate the conviction pursuant to sec. 974.06, Stats., claiming that his constitutional rights to due process and effective assistance of counsel were violated by the trial court's refusal to recuse itself. The motion was heard and denied by Judge Landry, the successor to Judge Seraphim in this action.

The motion challenges statements made by Judge Seraphim to defense counsel during the pretrial motion hearing held on March 6, 1978. During this hearing the judge, on several occasions, expressed irritation with defense counsel because he believed he was wasting the court's time and the taxpayers' money with "frivolous" objections and motions, and his habit of asking too many questions. The defendant also challenges the court's conduct in criticizing a police officer who in response to a question by defense counsel made an estimate of the defendant's height that did not match the suspect's broadcast description. In that instance, the court ordered a recess and remarked to the prosecutor, "[d]on't you practice with these witnesses." The defendant also claims that bias was shown at this hearing when, during direct examination of the defendant as to his physical and mental state during interrogation, the court interposed answers for the defendant.

Other challenged conduct at the March 6th hearing includes the court's action in holding irrelevant a line of questioning by the defense attorney and the court's expression of disbelief following the defendant's testimony that he had been denied a request to use the restroom. Another statement challenged by the defendant was the court's remark in response to the defense counsel's argument that the description of the suspect, upon which the

arrest of the defendant was made, was vague. The court stated that "[i]f I were to leave it to you [defense counsel] the police would never be able to arrest anybody."

The motion further challenges statements made at another pretrial hearing held on June 19, 1978. During the hearing Judge Seraphim ordered a change of venue when he was informed that the Supreme Court would probably grant a pretrial stay until the venue issue could be litigated.[2] While off the record, defense counsel approached the prosecutor and asked if he had an ex parte conversation with the trial court. The court overheard the question, took it as an insult, and an off-the-record exchange occurred. When they went back on the record the defendant's attorney alleged that during the off-the-record exchange Judge Seraphim told him, "I am going to fix you on the trial of this case."[3] At this point counsel asked the court to recuse itself. The court responded:

"*The Court:* There was more than that, sir. This trial in this case, if I may use the vernacular, horsing this case around, we are going to try this case. I am not going to recuse myself. I have now made arrangements, Mr. Clark, and I am ashamed of you, the man who came to me and asked me to put him in a law office, which I did, when you were a lawyer, and I did which you thank me for. I put you, when you graduated, into the District Attorney's Office and kept you there when you came and

[2] The court had previously, at the March 6th hearing, denied the defense's request for a change of venue.

[3] The exchange between Judge Seraphim and defense counsel was the subject of one of the judicial misconduct charges brought against Judge Seraphim and heard by the judicial conduct panel. The panel found that Judge Seraphim knew or should have known that his conduct failed to comply with standards 6 and 9 of the Wisconsin Code of Judicial Ethics. *In Matter of the Complaint Against Hon. Christ T. Seraphim*, No. 79–1729–J. The panel's determination was upheld by this court in *In Matter of Complaint Against Seraphim*, 97 Wis. 2d 485, 294 N.W.2d 485, cert. denied 449 U.S. 994 (1980), in which Judge Seraphim was suspended for a period of three years.

asked me that, and I had you in the District Attorney's Office. I have appointed you in this case. I'm a good friend of your mother's, a good friend of your sister's, and I was a good friend of your father's.

"[Defense counsel interrupts.]

"*The Court:* Just let me finish, sir. It is that attitude, sir, that attitude, sir, that is going to get you nowhere in the Courts of Milwaukee as long as I'm around."

Judge Seraphim went on to disclaim any prejudice against either the defendant or defense counsel.

Defense counsel then indicated that he was going to seek extraordinary relief in the Supreme Court. The court responded that he was ashamed of the defendant attorney's conduct and asked him if he wanted the defendant to get a trial. The attorney stated that he wanted him to get a fair and impartial trial and the court responded:

"Well, you are going to get one, but not if you keep bringing motions, I will tell you this. I'm not going—don't ever come to me with your bill on this thing, because I am not going to pay for all these motions that you are bringing up in the Supreme Court. I am not going to pay for them because I think they are unnecessary. I will tell you now."

A continuation of the pretrial motion hearing was held on June 21, 1978. At this time the court and the district attorney attempted to clarify the statements made at the June 19th hearing. The court denied stating it was going to "fix" defense counsel. Judge Seraphim acknowledged, stating "that if he [defense attorney] continued his tactics during the trial I was going to take care of him." The court then asked the district attorney what he remembered the court saying. The district attorney responded:

"My recollection was that you indicated at the conclusion of your statement to Mr. Clark that you would con-

trol this trial and that you would control Mr. Clark during the trial and not allow the type of conduct that had preceded his actions yesterday."

The court then stated:

"Of course, that was the action and intent of the Court. I will state I have no personal prejudice against Mr. Walberg or Mr. Clark and the way the Court handled the situation is the way I handled every attorney for eighteen years who has acted up in my court, friend or foe. Now I have had my say and we will go on with this hearing."

As previously noted, Judge Landry denied the defendant's motion for a new trial. The court found that there was no evidence that the statements made by Judge Seraphim amounted to a deprivation of rights or a violation of due process. The trial court emphasized the fact that the challenged remarks occurred in preliminary motions and outside the presence of the jury, and that there was no evidence that the trial court's actions affected the defendant's case. The court noted that while Judge Seraphim's actions were "not an example for judges to follow," it was a part of the judge's role to maintain discipline in the courtroom, which sometimes included criticizing attorneys for their courtroom conduct.

The court of appeals affirmed, finding that although the remarks were "intemperate and improper courtroom conduct," the defendant did not establish by clear and convincing evidence that the defendant was denied due process. The court found that the defendant's counsel "responded coolly, calmly and courteously to the trial court's onslaughts and courageously and effectively continued the defense of his client."

The first issue on appeal is what burden of proof applies in a motion for postconviction relief pursuant to sec. 974.06, Stats. Sec. 974.06(6) provides:

"(6) Proceedings under this section shall be considered civil in nature, and the burden of proof shall be upon the prisoner."

Although denominating the proceeding as civil and placing the burden on the defendant, the statute does not articulate the quantum of proof necessary to meet this burden. We conclude on the basis of public policy that the higher civil burden of clear and convincing evidence applies to sec. 974.06 motions.

There are two different burdens of proof that apply in civil actions: fair preponderance of the evidence and clear and convincing evidence.[4] The fair preponderance standard applies in ordinary civil actions.[5] The clear and convincing standard applies in cases where public policy requires a higher standard of proof than in the ordinary civil action.[6] This so-called middle burden of proof has been required in such cases as fraud, undue influence, and prosecutions of civil ordinance violations which are also crimes under state law.[7]

The court of appeals, relying on its decision in *Rohl v. State*, 90 Wis. 2d 18, 28–29, 279 N.W.2d 722, 279 N.W. 2d 731 (Ct. App. 1979), *modified on other grounds*, 96 Wis. 2d 621, 292 N.W.2d 636 (1980), held that the clear and convincing burden of proof was applicable to sec. 974.06 motions. We agree. The court in *Rohl* cited to *State v. Carlson*, 48 Wis. 2d 222, 230, 179 N.W.2d 851 (1970), and *State v. Reppin*, 35 Wis. 2d 377, 385, 151 N.W.2d 9 (1967), as authority for its holding. In *Carlson* and *Reppin* we held that a defendant seeking to withdraw a guilty plea has the burden of proving adequate grounds for the withdrawal by clear and con-

[4] *Madison v. Geier*, 27 Wis. 2d 687, 135 N.W.2d 761 (1965); *Kuehn v. Kuehn*, 11 Wis. 2d 15, 104 N.W.2d 138 (1960).

[5] *Kuehn*, 11 Wis. 2d at 26.

[6] *Madison v. Geier*, 27 Wis. 2d at 692.

[7] *Id.*

vincing evidence. The rationale behind the use of this higher standard of proof is that once the guilty plea is entered the presumption of innocence is no longer applicable, and when the record on its face shows that the defendant was afforded constitutional safeguards, the defendant should bear the heavier burden of showing that his plea should be vacated.[8] Once the defendant waives his constitutional rights and enters a guilty plea, the state's interest in finality of convictions requires a high standard of proof to disturb that plea.

We find that similar policy considerations are present in motions for postconviction relief pursuant to sec. 974.06, Stats. The defendant's rights are much more limited under sec. 974.06 than on direct appeal.[9] As we stated in *Peterson v. State*, 54 Wis. 2d at 381:

"The postconviction motion under sec. 974.06, Stats., is not a substitute for a motion for a new trial. A sec. 974.06 motion can be made only after the defendant has exhausted his direct remedies which consist of a motion for a new trial and appeal. A sec. 974.06 motion is limited in scope to matters of jurisdiction or of constitutional dimensions. The motion must not be used to raise issues disposed of by a previous appeal. Fundamentally, the motion was authorized as a substantial replacement for the petition for habeas corpus in this court. Matters which usually were presented by petition for habeas corpus to this court now are covered by the sec. 974.06 postconviction motion to the trial court. A petition for habeas corpus can still be presented to this court, but not until the procedure under sec. 974.06 has been exhausted, or is not applicable. Such issues as sufficiency of the evidence, jury instructions, error in admission of evidence, and other procedural errors cannot be reached by a sec. 974.06 motion."

[1]

Thus a sec. 974.06 motion is only available after state process and the conviction have been finalized. The stat-

[8] *State v. Koerner*, 32 Wis. 2d 60, 67, 145 N.W.2d 157 (1966).

[9] *Peterson v. State*, 54 Wis. 2d 370, 383, 195 N.W.2d 837 (1972).

ute is an exception which allows collateral attack on the conviction after a finding of guilt by either a jury or a court. Because the conviction being challenged has been secured in a proceeding whereby the defendant was protected by the beyond a reasonable doubt standard of proof, and the motion is available only after other post-conviction remedies have been unsuccessful or not utilized, public policy requires that the defendant bear the heavier burden in order to get relief from such a finalized conviction. The clear and convincing burden of proof is required to further the public policy of finality of judgments after the defendant has been given ample opportunity to challenge the conviction by direct remedies.

However, this burden of proof is not critical to the present case because the determination of whether the trial court should have recused itself depends entirely on a review of undisputed statements contained in the record. "The purpose of a standard of proof is to 'instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'"[10] The burden of proof relates only to the proof of facts and has no application in cases involving undisputed facts. As we said in *State v. Williams*, 104 Wis. 2d 15, 21, 310 N.W.2d 601 (1981), "When the principal facts and the only reasonable inferences are undisputed, as is true in the present case, this court is not bound by the findings of fact of the lower courts." The court went on to hold that in such circumstances it may examine the factual record *ab initio* and decide the claim presented as a matter of law. 104 Wis. 2d at 22. Therefore the decision in this case, whether Judge Seraphim should have

[10] *State v. Hanson*, 100 Wis. 2d 549, 563, 302 N.W.2d 452 (1981), quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979). *See also, Kuehn v. Kuehn*, 11 Wis. 2d at 26.

recused himself, is a conclusion of law and the court's review is *de novo*.

The principal issue on appeal is whether the defendant's rights to due process and effective assistance of counsel were violated by Judge Seraphim's failure to recuse himself.

The right to a fair trial includes the right to be tried by an impartial and unbiased judge.[11] This right was put on a constitutional basis[12] in *State ex rel. Mitchell v. Bowman*, 54 Wis. 2d 5, 6–7, 194 N.W.2d 297 (1972), where the court stated:

". . . under the constitution no person, whether a juvenile or an adult, should be tried by a judge if the person involved can prove that the judge is prejudiced against him. Every person has a right to a fair trial by an impartial judge and jury; due process requires this."

[2]

This court in *State v. Asfoor*, 75 Wis. 2d 411, 436, 249 N.W.2d 529 (1977), set out the standard for recusal:

"Although the judge acted fairly in this case, in some situations he should recuse himself. 'The trial judge should recuse himself whenever he has any doubt as to his ability to preside impartially in a criminal case or whenever he believes his impartiality can reasonably be questioned.' ABA Standards, *The Function of the Trial Judge*, sec. 1.7 (1971). The trial judge here had no doubt of his ability to preside impartially in this case. The question then becomes whether there was any appearance of impartiality. *Code of Judicial Ethics*, 36 Wis. 2d 252, 256, Standard 3 (1967)."

[11] *State v. Washington*, 83 Wis. 2d 808, 833, 266 N.W.2d 597 (1978); *State v. Asfoor*, 75 Wis. 2d 411, 249 N.W.2d 529 (1977); *State v. Bell*, 62 Wis. 2d 534, 536–37, 215 N.W.2d 535 (1974).

[12] The defendant had no statutory right of substitution against Judge Seraphim pursuant to sec. 971.20, Stats., because he had already exercised that right by filing for a written substitution against Judge Victor Manian.

This case establishes two tests for recusal.[13] A subjective test based on the judge's own determination of his or her impartiality and an objective test based on whether impartiality can reasonably be questioned. Because Judge Seraphim clearly indicated that he did not doubt his ability to preside impartially at trial, the subjective test has been satisfied. The objective test remains for our consideration. Under this test Judge Seraphim should have recused himself if his impartiality could reasonably be questioned.

The prejudice alleged in this case is based entirely on the trial court's treatment of defense counsel during pretrial proceedings. The defendant contends that the bias Judge Seraphim demonstrated against defense counsel resulted in prejudice to the defendant, and that bias against the attorney in such circumstances is grounds for recusal.

This court has never addressed the issue of whether judicial prejudice against counsel can constitute bias against the client. We find that a claim of judicial prejudice against a party based on bias against the attorney is not essentially different from any other claim of judicial prejudice. The focus is the interests of the client. "If the judge evidences a lack of impartiality, whatever its origin or justification, the judge cannot sit in judgment."[14] While judicial prejudice against the at-

[13] This is also the standard established by statute. Sec. 757.19 (2) (g), Stats., provides:

"(2) Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:

". . .

"(g) When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner."

[14] *State v. Washington*, 83 Wis. 2d 808, 833, 266 N.W.2d 597 (1978).

torney does not generally or presumptively constitute bias against the client if it can be shown that the bias toward counsel adversely affected the client's interests, then recusal is required.[18]

The *Asfoor* standard of recusal can be applicable to claims of judicial prejudice based on bias against the attorney. If the judge has any doubts as to his or her impartiality *to the client*, or if impartiality can reasonably be questioned based on the judge's relationship with the attorney, then disqualification is mandated. But it should be noted that recusal based on bias toward the attorney is the exceptional situation. A mere showing of antagonism or of a strained relationship between counsel and the court is not sufficient to require disqualification. The judicial bias toward the attorney must be sufficiently severe as to reasonably call into question the court's impartiality toward the litigant.

Turning to the allegations of prejudice in this case, we find that Judge Seraphim's impartiality toward the defendant can reasonably be questioned based on his conduct toward defense counsel. Several of the challenged remarks do not establish prejudice but rather are indirect attempts to challenge the court's rulings on the pretrial motions. Thus Judge Seraphim's comments regarding the legality of the arrest, the defendant's credibility and his actions in finding certain evidence to be irrelevant did not create an appearance of partiality against either counsel or the defendant. These matters were within his discretion as trial judge. If the rulings were decided incorrectly they should have been the subject of a direct appeal rather than a claim of denial of constitutional rights under sec. 974.06, Stats.

Many of the statements relied on to show prejudice involved the court's expression of irritation with defense

[18] *See generally*, Annot., *Disqualification of Judges for Bias Against Counsel for Litigant*, 23 A.L.R.3d 1416 (1969).

counsel for bringing what it believed to be "frivolous" motions and objections, and generally wasting the court's time. These remarks, standing alone, would not give the appearance of bias because such statements are generally within a trial court's power to control the conduct of the proceedings in order to assure orderly and efficient administration of justice. However, when taken together with the judge's entire course of conduct during the pretrial proceedings, they create the appearance that the court was allowing its irritation with defense counsel to affect its impartiality toward the defendant.

Several of the court's actions during the pretrial proceedings gave the appearance that the court had prejudged the merits of the defendant's case. In one instance the court interjected an answer on behalf of the defendant. In another the court criticized a state witness for giving an answer favorable to the defense. These statements, when taken in conjunction with the court's characterization of the defense counsel's actions in bringing the motions and voicing objections as "frivolous," create the appearance that the judge was not objective in his determination of the motions and objections.

But the most serious of the allegations of prejudice is the court's comment that he was going to "fix" the defense attorney at trial. The court denied using the exact phrase alleged, but acknowledged that he was going to "take care" of the attorney at trial. Further, the court told the defense attorney that he was going to get nowhere in the Milwaukee courts as long as the judge was around. The court also stated that the defendant would get a fair trial "but not if you [defense counsel] keep bringing motions."

We find that these statements created the appearance that the judge was biased against defense counsel and that this bias was affecting his impartiality to the defendant. The court, in effect, was telling defense counsel

he must choose between bringing the motions and obtaining a fair trial for the defendant. He further appeared to be threatening counsel's personal and economic interests if he continued defending his client by bringing motions and voicing objections.

[3]

Therefore we conclude that because Judge Seraphim's actions during the pretrial motion hearing created the appearance of partiality against the defendant, his failure to recuse himself was error.

However, we find that this error was harmless beyond a reasonable doubt. "Even errors of a constitutional dimension may be subject to the rule of harmless error."[16] The factors to be used in determining whether a constitutional error is harmless include: (1) the frequency of the error, (2) the nature of the state evidence against the defendant, and (3) the nature of the defense.[17]

Although the error occurred frequently during pretrial proceedings, there is no claim of error during the trial. All the objectionable statements occurred outside the presence of the jury and were made in connection with pretrial motions to suppress evidence and a motion to change venue. The parties agree that there was no misconduct on the part of Judge Seraphim *at trial* to support the allegation that the defendant was denied his rights to effective assistance of counsel and an impartial judge. There is no complaint of any trial error other than the defendant's contention that the defense attorney's trial performance might have been "chilled" because of Judge Seraphim's pretrial conduct.

[16] *State v. Zellmer*, 100 Wis. 2d 136, 150, 301 N.W.2d 209 (1981); *see also, Whitty v. State*, 34 Wis. 2d 278, 288–89, 149 N.W.2d 557 (1967); *Chapman v. California*, 386 U.S. 18 (1967).

[17] *Rudolph v. State*, 78 Wis. 2d 435, 443, 254 N.W.2d 471 (1977); *Reichhoff v. State*, 76 Wis. 2d 375, 381, 251 N.W.2d 470 (1977).

There is nothing in the record to support the defendant's contention. A reading of the entire trial transcript reveals that the attorney conducted an adequate and effective defense of his client. During the trial he vigorously cross-examined all of the state's witnesses, freely questioned the defendant when he took the stand and continued to voice objections and present motions on behalf of his client. The record further reveals that Judge Seraphim did not repeat his improper pretrial conduct at trial.[18] He was courteous to defense counsel and freely allowed him to conduct the defense of his client.

Moreover, there is no evidence in the record that during the pretrial motions the defense attorney's performance was "chilled." The record demonstrates that the defense attorney continued to make motions and voice objections even in the face of repeated criticism by Judge Seraphim. The record is entirely barren of any evidence that Judge Seraphim's conduct in any way affected defense counsel's conduct at any point in the proceedings leading up to conviction and sentencing. Further, there is no evidence or even the contention by the defendant, that the jury which convicted the defendant was in any way influenced by the conduct of the trial court.

Examining the record in light of the second and third factors, we find they also support a finding of harmless error. The defendant makes no complaint that there was insufficient evidence on which to base the conviction. No direct appeal was taken from either the pretrial or trial proceedings. The state's case was founded on strong evidence linking the defendant to the burglary. It included testimony of one of the victims of the burglary who found the defendant in his apartment. It also included a statement made by the defendant following arrest acknowledging participation in the burglary. The

[18] If this improper conduct appeared in trial we would be confronted with a different problem.

defense consisted entirely of the defendant's testimony in which he stated that he was present at the burglary scene but did not realize a burglary was in process. Based on the strength of the state's case, the jury could have easily disbelieved the defendant.

[4]

Thus, we conclude on a review of the entire record that the trial court's failure to recuse itself was harmless error beyond a reasonable doubt.[19] The error was non-prejudicial in that it had no effect on the defense attorney's conduct at any point during the trial. More importantly, the error had no effect on the jury's determination of guilt. Judge Seraphim's actions, although constituting error and improper judicial conduct, did not deny the defendant his right to effective assistance of counsel and the right to a fair and impartial trial.

By the Court.—Judgment affirmed.

[19] *Chapman v. California*, 386 U.S. 18, 23–24 (1967); *Tumey v. Ohio*, 273 U.S. 510 (1927); *Rudolph v. State*, 78 Wis. 2d at 443. *Tumey*, as cited in *Chapman*, does not stand for the proposition that the right to an impartial judge can never be subject to the harmless error rule. *Tumey* involved the constitutionally mandated disqualification of the judge because he had a direct and substantial pecuniary interest in finding the defendant guilty because the judge received costs only when the defendant was convicted. That this type of judicial prejudice is distinguishable from the instant case is clear from the court's decision in *Tumey*, where it stated: "All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, *personal bias*, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." (Emphasis supplied.) 273 U.S. 510 at 523.

No. 81-605
STATE OF WISCONSIN
IN COURT OF APPEALS
DISTRICT I

Filed
Dec. 21 1981

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

ROBERT WALBERG,
Defendant-Appellant.

APPEAL from an order of the circuit court for Milwaukee county: CHRIST T. SERAPHIM, Judge. *Affirmed.* APPEAL from an order of the circuit court for Milwaukee county: ROBERT W. LANDRY, Judge. *Affirmed.*

Before Decker, C.J., Moser, P.J., and Randa, J. DECKER, C. J. Defendant Robert Walberg, after a jury trial, was convicted of burglary, possession of burglarious tools, and habitual criminality (as to both counts), contrary to secs. 943.10(1)(a), 943.12, and 939.62, Stats. Three issues are raised on appeal. The public defender argues for the defendant that Walberg was denied effective assistance of counsel and the right to a fair trial because the trial judge was biased and refused to recuse himself from the case. The defendant argues *pro se* that the criminal complaint was void and that he was prosecuted by private attorneys, not the state, because the oaths of office were untimely taken by both the district attorney and assistant district attorneys of Milwaukee County. We reject the arguments and affirm the judgment of conviction and the order denying post-conviction relief.

Post-conviction relief was sought pursuant to sec. 974.06, Stats., which authorizes a proceeding where the defendant has the burden of proof. This burden was

stated in *Rohl v. State*, 90 Wis.2d 18, 28-29, 279 N.W.2d 722, 725 (Ct. App. 1979), *modified on other grounds*, 96 Wis.2d 621, 292 N.W.2d 636 (1980) (citations omitted):

> On a motion under sec. 974.06, Stats., the defendant has the burden of proving that he is entitled to relief. Sec. 974.06, Stats. The defendant is only entitled to relief if he can show by clear and convincing evidence ... that the judgment was rendered without jurisdiction or that the sentence imposed was not authorized by law or is otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the defendant as to render the judgment vulnerable to collateral attack, sec. 974.06(3)(d), Stats.

Walberg argues that various remarks made by the trial court at pretrial motion hearings denied him his constitutional right to due process.

A review of the record establishes that these remarks were intemperate and improper courtroom conduct.[1] The fact that they were made does not establish, by clear and convincing evidence, a denial to defendant of his right to due process. Walberg's argument misunderstands the function of appellate review:

> Judicial conduct creating the need for disciplinary action can grow from the same root as judicial conduct creating potential appellate review, but one does not necessarily exclude the other. One path seeks to correct past prejudice to a particular party; the other seeks to prevent potential prejudice to future litigants and the judiciary in general. *In re Laster*, 274 N.W.2d 742, 745 (Mich. 1979), quoted in *In re Seraphim*, 97 Wis.2d 485, 512, 294 N.W.2d 485, 500, *cert. denied*, 449 U.S. 994 (1980).

As we said in a similar context on another occasion, the issue is directed to propriety of the conviction, not whether the trial court should be vindicated. *See State v. Harrell*, 85 Wis.2d 331, 339, 270 N.W.2d 428, 433 (Ct. App. 1978).

Walberg has not established that the trial court caused the defendant to be denied a fair trial, nor has it been established that the trial court's remarks rendered Walberg's counsel ineffective. Our review of the record leads us to conclude that Walberg's counsel responded coolly, calmly, and courteously to the trial court's onslaught and courageously and effectively continued the defense of his client.

Our further review of the record does not establish, by clear and convincing evidence, that the trial court was prejudiced against Walberg.

Walberg argues *pro se* that the criminal complaint is void because: (1) the assistant district attorney lacked the statutory authority to administer the oath to the complaining witness; and (2) the assistant district attorney is without authority to issue an arrest warrant.

Section 968.01, Stats., was properly followed in this case, and the criminal complaint was properly issued. The defendant's second argument is based upon a wholly misplaced reliance on *Walberg v. State*, 73 Wis.2d 448, 243 N.W.2d 190 (1976), and is without application to this case. The earlier *Walberg* case was concerned with issuance of search and arrest warrants. This case is concerned with issuance of a criminal complaint after arrest.

Another *pro se* issue raised by Walberg is that the untimely filing of an oath of office by the district attorney and assistant district attorneys of Milwaukee County resulted in the defendant being tried not by the state of Wisconsin, but by private attorneys. This is claimed by defendant as an illegal prosecution.

Even if we were to assume that Walberg did not waive this objection at trial by failing to challenge the prosecution and that the oaths of office were untimely filed, the legality of Walberg's conviction is not affected. An officer is a *de facto* officer when he is in possession of the office, performing the duties of that office, and claims to be such an officer under color of election or appoint-

ment. *State ex rel. Reynolds v. Smith*, 22 Wis.2d 516, 522, 126 N.W.2d 215, 218 (1964). The district attorney and assistant district attorneys may not have their official actions collaterally challenged.

By the Court. — Orders affirmed.

Recommendation: Not recommended for publication in the official reports.

APPENDIX

[1]The trial judge has been punished for his unprofessional conduct accorded to this defendant's attorney and defendants and attorneys in other caes [*sic*]. In *re Seraphim*, 97 Wis.2d 485, 294 N.W.2d 485, *cert. denied*, 449 U.S. 994 (1980).

JUDGMENT — ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
July 1, 1985.

Before
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. WESLEY E. BROWN, Senior District Judge*

ROBERT WALBERG,
Petitioner-Appellant,

No. 84-2435 vs.

THOMAS ISRAEL,
Respondent-Appellee.

Appeal from the United States
District Court for the
Eastern District of Wisconsin.

No. 83-C-381
Terence T. Evans, Judge.

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, _____ Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED with DIRECTIONS, in accordance with the opinion of this Court filed this date.

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* Hon. Wesley E. Brown of the District of Kansas, sitting by designation.

EXCERPTS FROM PRETRIAL HEARING ON MARCH 6, 1978 (Answer 0:3-158)*

THE COURT: All right, so now we have taken care of discovery. Proceed with your motions, the remaining motions.

MR. KLINKOWITZ [assistant district attorney]: I would suggest, Your Honor, that we start with the circumstances of the arrest and I'll proceed then through the —

THE COURT: Maybe some of these motions overlap?

MR. KLINKOWITZ: They do, and I think —

THE COURT: If you have the same witnesses.

MR. KLINKOWITZ: That's correct.

THE COURT: As to statements or identification.

MR. KLINKOWITZ: If we take them as a whole.

THE COURT: Take them as a whole.

MR. KLINKOWITZ: We can, start to finish chronologically.

THE COURT: All right.

MR. CLARK [defense counsel]: Taking them as a whole? What are we doing here, Mr. Klinkowitz, are you taking the arrest first?

THE COURT: He'll tell you that.

MR. KLINKOWITZ: That's the first thing that happened.

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*"Answer __:__" refers to the exhibit and page numbers in the original Answer to Petition for Writ of Habeas Corpus where Appendix material can be found.

MR. CLARK: Your Honor, they are my motions, I don't want Mr. Klinkowitz to dictate to me the fasion [*sic*] —

THE COURT: He has the burden of proof.

MR. CLARK: On some.

THE COURT: All right. Do you want to proceed? Proceed since you want to call witnesses first.

MR. CLARK: I'm not familiar with his witnesses, I don't know who arrested this man.

THE COURT: Then he's going to dictate how he's going to submit his evidence here. Now that was absolutely unnecessary and ridiculous.

MR. CLARK: What's that?

THE COURT: You make an objection, then we turn over to you to proceed and you say you don't want to proceed, you don't know, so he's got to proceed and all you did is clutter the record.

Answer 0:20-21.

* * * * * *

Q [by Mr. Clark] Did you in your testimony consult at all with those extra sheets of police reports that I was just given this morning?

A [by Officer Wiesmueller] No, sir.

Q You are familiar with this case, are you not?

A Yes, sir.

Q Okay, you are referring to your collective knowledge of this investigation, are you not?

A To my present knowledge and also to the reports, yes, sir.

Q That's right, but it is also quite possible, is it not, that in your testimony you of course are referring to events that you memoralized [*sic*] along with your partner in these documents, right?

A I'm not sure I understand your question, sir.

THE COURT: I don't either.

MR. CLARK:

Q Sir —

THE COURT: I think you heard the questions that were asked and the answers that were given, Mr. Clark, why don't you ask him a specific question?

MR. CLARK:

Q All right, sir, is it possible that as you reflect upon the testimony you gave here this morning regarding these circumstances that you could very well have utilized parts of those extra documents of which I have not been previously provided a copy?

MR. KLINKOWITZ: I would object to the question, it calls for speculation, it's already been asked and answered that he didn't use those documents this morning.

THE COURT: Objection is sustained.

MR. CLARK: Your Honor, I ask leave for a moment then to examine these documents which I haven't had a chance to look at yet.

THE COURT: Go ahead.

MR. KLINKOWITZ: A copy right on the record —one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen — fourteen pages of documents starting out with supplementary reports bearing the signature of Leffler and Marrick, and ending with the report of the Wisconsin Crime Laboratory on the tool mark examination of the tools that were seized at the time of the arrest.

THE COURT: Do any of those documents, Mr. Klinkowitz, refer to the testimony that we have talked about today?

MR. KLINKOWITZ: Let me just examine it. Yes, one of them, the second page.

THE COURT: Well, is it information that isn't on the other reports?

MR. KLINKOWITZ: Yes, it's a supplementary statement, it was information obtained.

THE COURT: Okay.

MR. CLARK: Well, if Your Honor please there appears to be more commencing with page three.

THE COURT: Well, go ahead.

MR. CLARK: Subsequently, judge, this is information that he testified to about the line-up.

THE COURT: He may have it in other documents that may be included.

MR. KLINKOWITZ: Well, I don't think that's the issue, judge, the question was whether or not he used those documents to refresh his recollection and he said no.

THE COURT: I know that, I know that. Read it and examine him please. He told you what he did, in fact his testimony was very limited.

MR. CLARK: Your Honor, I move for a continuance as to this motion to allow me an opportunity to evaluate —

THE COURT: Move on. I don't want to hear another frivilous [*sic*] motion out of you, Mr. Clark, I'm warning you.

(Mr. Clark studying documents.)

Answer 0:44-46.

* * * * * *

Q [by Mr. Clark to Officer Wiesmueller] You also in your earlier testimony indicated that Mr. Gottsch told you or described, am I correct, that jacket as being a spring weight jacket?

MR. KLINKOWITZ: I object to the form of the question, there is no testimony that this jacket is the jacket worn at the time the offense was committed.

THE COURT: Objection is sustained.

MR. CLARK:

Q This jacket was the jacket worn at the time of this man's arrest; isn't that correct, as far as —

THE COURT: He has answered that twice, but if he doesn't know if it's the same jacket worn at the time of the offense it's clear, why keep going over the same ground?

MR. CLARK:

Q Sir, what time was Mr. Walberg arrested?

A As I stated, sir, it was 8:00, 8:30 or 9:00 o'clock, I'm not sure of the exact time. I was not present at the time of his arrest.

Q And what time did this alleged burglary occur?

A The burglary was discovered and the two individuals left at approximately 6:40 p.m.

Q So he was arrested two to two-and-a-quarter hours after this incident?

A Approximately, yes, sir.

Q Did the complainant, Mr. Gottsch, describe the shirt that Mr. Walberg is alleged to have been wearing, or presumably was wearing?

A No, sir, he did not.

Q Did he describe the pants in terms of colors or style?

A As I stated, sir, other than being a wash type pants I don't have any recollection of the pants.

Q Did he describe to you any footwear that Mr. Walberg may have been wearing or would have been wearing?

A No, sir, he did not.

THE COURT: I think he gave you everything that he did describe. Are we going to go into everything now he didn't describe? He told you what description he had.

MR. CLARK: I want to be certain I have the complete description, Your Honor.

THE COURT: You have it. If there was anything else he would have given it to you. You have it in all the documents. I imagine he didn't count his teeth, didn't give him the color of his eyes or the shape of his nose, the shape of his ears. He didn't have a point on his head. I'm sure there were a lot of things that weren't given.

All right, I'm going to recess the taking of testimony now because Mr. Klinkowitz is needed at Judge Landry's court to testify at this moment in another trial. This case will reconvene here at 2:00 o'clock. ...

Answer 0:50-52.

* * * * * *

Q [by Mr. Clark] And do you recall at what time you gave the rights to Mr. Walberg?

A [by Officer Wiesmueller] At approximately 10:10 p.m.

Q In addition to yourself and presumably Mr. Leffler did anyone else interview Mr. Walberg at the detective bureau?

MR. KLINKOWITZ: I object unless it's more specific as to time and date.

THE COURT: Do you know if anyone talked to him there on that date?

THE WITNESS: Not on that evening from my own personal knowledge.

MR. CLARK:

Q But you weren't there that entire time that Walberg was up in the detective bureau; were you?

A No, sir, I was not.

Q There could have been others interviewed?

THE COURT: Of course, if he wasn't there there [*sic*] answer is obvious. Someone else may have talked to him, you don't even have to ask that question. How does that help you. Obviously if he wasn't there somebody must have been able to talk to him. That is something you can bring out affirmatively if there is some point to it. Next question.

MR. CLARK:

Q What time was the interview of Mr. Walberg concluded?

A As I stated before, sir, I believe that the entire interview took approximately forty-five minutes, may have taken as long as an hour. I was not present during the entire portion of the interview. For a small part of that interview I was out of the room.

Answer 0:58-59.

* * * * * *

Q [by Mr. Clark] Okay, as to the line-up I'm aware of who Mr. Damagalski as he's indicated as having been in that line-up. Who are the other participants?

A [by Officer Wiesmueller] Do you want their names, sir?

Q No, their identities. Their names I have from my copy of the show-up of the line-up.

THE COURT: Identity in what way?

MR. CLARK: As to their occupation, Your Honor, or where they came from.

THE COURT: Well, how is that material? You have their names and you have a picture of them, what is the difference where they work and where they live and what they are charged with?

MR. CLARK: Withdraw the question.

Answer 0:61-62.

* * * * * *

REDIRECT EXAMINATION

BY MR. KLINKOWITZ:

Q How old is Mr. Walberg?

A [by Officer Wiesmueller] Mr. Walberg is forty-nine years of age.

Q He was placed in the line-up in the clothes in which he was arrested?

A Yes, sir.

Q Those clothes were not placed only for the special purpose of the line-up?

A No, sir, they were not.

THE COURT: Now that could be open to interpretation. He said he wasn't wearing the jacket when he went into the line-up.

MR. KLINKOWITZ: Okay.

THE COURT: So why are we even going over this? Yes, all the clothes that he was wearing were the clothes he wore at his arrest minus some items he was wearing at the time of his arrest. Now we have gone over this whole thing twice.

MR. KLINKOWITZ: Judge, I'm merely trying —

THE COURT: I know, but now on the record these are the clothes he was wearing when he was arrested, they are not — he was wearing other clothing when he was arrested.

MR. KLINKOWITZ: Judge, I think the test is whether or not the police dressed him up in any particular type of clothing to stand in the line-up.

THE COURT: I think it was clear he was wearing the same clothingminus [*sic*] the jacket; isn't that right, Mr. Weismueller?

THE WITNESS: Yes, judge.

Answer 0:64-65.

* * * * * *

MR. KLINKOWITZ: And I have no further questions of this witness.

THE COURT: Step down. By the way, how many statements do you claim he made?

MR. KLINKOWITZ: A statement after his arrest, single statement.

THE COURT: That's it, no other statement, so we can dispose of that. Do you have any other witnesses to the statement?

MR. KLINKOWITZ: Detective Leffler.

THE COURT: Well, bring him in.

MR. KLINKOWITZ: I would prefer to move in chronological order back to the arrest.

THE COURT: Okay.

MR. KLINKOWITZ: May I at this time keep Detective Weismueller with me?

THE COURT: Of course.

MR. KLINKOWITZ: He completed the investigation and is in charge of the police files.

THE COURT: Okay.

MR. CLARK: I would object to that unless he's not going to be testifying in any other aspect of this proceeding.

THE COURT: As you know under the rules of evidence one officer may remain at the side of the District Attorney at all times. You [*sic*] objection is overruled, it has no basis in the law. He can testify a hundred times after this, after he hears all of the other officers.

(Witness steps down.)

—0—

THE COURT: Another frivilous [*sic*] objection which cluttered the record. Read Young's [*sic*] summary of what a good cross examination consists of.

Answer 0:68-69.

* * * * * *

Q [by Mr. Clark] So as you observed Mr. Damagalski you are saying then you compared him to the description that you have?

A [by Officer Haas] That's correct.

Q What did you observe Mr. Damagalski do after going to the mailbox?

A Walked towards rear of building.

Q When he came out to the mailbox did he come from the interior of the building, did he come out the front door, presuming there is a front door?

A I observed him come out the side of the building from an unknown place.

Q Where on the building is the mailbox located?

MR. KLINKOWITZ: I don't know what this has got to do with probable cause for the arrest. I'm going to object, it's just a discovery proceeding.

MR. CLARK: It doesn't sound like criminal activity to me so far.

THE COURT: He didn't say it was criminal activity.

MR. CLARK: They are giving the circumstances of the arrest, Your Honor.

THE COURT: He said he made the arrest when he saw Mr. Walberg standing by an automobile, matching the description of the automobile and the description given by one of the occupants, and he placed him under arrest and observed certain items in the front passenger's side floor, and also in the rear, and he made the arrest and that was it. Now why don't we stick to that and forget Damagalski.

MR. CLARK:

Q Where did the arrest take place?

THE COURT: You are strengthening the case. He recognized Damagalski's description as the other man who allegedly committed this burglary in the alley in the rear of 827 West Maple Street.

MR. CLARK:

Q How did you have occasion to return or to get to the rear of that building?

A I was summoned by other officers at the scene.

Q And these other officers were located where?

A They were watching the rear of that address.

Q How many officers were watching the rear of the address?

A Two.

Q And which officers were those?

A Those were Officers Bobot and Mazurek.

Q When you came to the rear of the building did you have occasion to see those two other officers?

A Yes, I did.

Q When you first saw them what was each of them doing?

MR. KLINKOWITZ: Again —

THE COURT: Objection sustained.

MR. KLINKOWITZ: Immaterial.

MR. CLARK:

Q Where were they located?

MR. KLINKOWITZ: Same objection.

THE COURT: Sustained. Can't we just stick to the arrest? What's the difference what the other officers were doing.

MR. CLARK: Well, if Your Honor please, I'm trying to get at the fact that these other men may have had a gun out and had him in tow so-to-speak when this man came forward.

THE COURT: Fine, put it on as an affirmative defense of some sort but I don't know what this has —he didn't bring it out, they had — he told you under what circumstances he arrested this man and he made the arrest; right, sir?

THE WITNESS: That's correct.

THE COURT: All right, I don't care what anybody else was doing, even if they had a gun on them. He told you under what circumstances he made the arrest. They could have had machine guns on them.

MR. CLARK: Well, Your Honor, I would contend that if somebody else had entered in any — any other police officer had interfered with the liberty of Mr. Walberg and stopped him in back prior to this man's arrival to the rear then he did not do the arresting, it was somebody else.

THE COURT: No. He said he made the arrest. If you want to ask him anything else put Walberg on, he'll tell you if he has some different story. He said he made the arrest. Did anybody else have him in custody?

THE WITNESS: Yes.

THE COURT: Who had him in custody?

THE WITNESS: Officers Bobot and Mazurek.

THE COURT: They were talking to him?

THE WITNESS: No, they were standing approximately thirty feet from him with their guns drawn.

THE COURT: All right, now we know what the officer [*sic*] officers were doing, but they didn't have him in custody?

THE WITNESS: No, sir.

THE COURT: An arrest, had they placed him under arrest?

THE WITNESS: No, sir.

THE COURT: They just had their guns on him?

THE WITNESS: Yes.

THE COURT: All right.

MR. CLARK:

Q What was Mr. Walberg doing as he had these guns pointed on him when you arrived on the scene?

A Standing next to the car.

Q Where were his hands?

A Over his head on top of the roof.

Q So it was apparent to you he had perceived the presence of these police officers and apparently had been responding to some command of theirs?

A That's correct.

Q And this was the point where you first observed the defendant; right?

A That's correct.

Q So then isn't it true that you did not observe Walberg committing any illegal activity or crime in your presence?

A No, sir.

THE COURT: He didn't testify to that, did he? There is nothing in the record that he did anything illegal while he was standing by the automobile when he made the arrest. Why do we have to have it negatively? I'm not impressed by it and the record is not going to be any different. I'm trying to shorten it. Why can't we proceed here. If you have something bring it out for gosh sakes but you haven't brought out anything. Now we have been at this for two hours.

MR. CLARK: Your Honor, I'm looking at the probable cause to arrest.

THE COURT: Identification, that's all he brought out, identification is the only basis upon which he made the arrest, that's it. He hasn't brought out anything else.

MR. CLARK:

MR. CLARK: But I contend that an arrest constitutes more than someone making — quite probably saying "you are under arrest" after other officers have already apprehended him.

THE COURT: You have been arguing that but right now that's all he has said. He made it on the basis of identification of the individual and the car and this could have taken five minutes and all you are doing is running up a bill of thirty dollars an hour. You have got to impress me that you have got something, that there is something illegal, and even then we question, even if it were an illegal arrest, whether the law is such today that he would be released.

MR. KLINKOWITZ: Judge, there is no contention of that, I think the only impact would be the acceptance of this Court of the man's statement.

THE COURT: I understand, I understand.

MR. CLARK:

Q Mr. Walberg make any statements to you?

A Not that I recall, no.

Q Do you recall or do you know the clothing which Walberg was — strike that. How did you conclude, sir, that beyond the fact that he apparently may have been with Mr. Damagalski, how did you otherwise conclude that he should be arrested?

A By his physical description.

Q As to physical description what were you relying upon?

A His build.

THE COURT: No, how did you get his physical description he means?

THE WITNESS: Off the police radio, they gave a physical description of the second subject.

MR. CLARK:

Q Is that the same description that is included in the police reports of this matter, the teletype description?

A I believe it is.

Q Is Mr. Walberg five feet nine inches tall?

A I believe he's a little taller than that.

Q Then he's taller than five nine?

A Approximately five ten or five eleven.

THE COURT: How do you know, where are you getting the five ten, five eleven?

THE WITNESS: From my height.

THE COURT: The report, well, do you have any official records? The record shows he's five nine, why do you come up with ten or eleven, unless you know don't testify. By your height I don't want you to get —did you weigh him, did you measure him? Wiesmueller has also said he's five nine. Take a recess. Don't you practice with these witnesses.

Answer 0:79-85.

* * * * * *

Q [by Mr. Clark to Officer Mazurek] Did you have a warrant for the arrest?

THE COURT: No, he did not. Next question.

MR. KLINKOWITZ: I will stipulate that there was no warrant out for Mr. Walberg.

THE COURT: Why do you ask that, Don, we know that there was no warrant, all of us do.

MR. CLARK: Your Honor?

THE COURT: Where would they get a warrant from at this time of the night after a burglary just committed two hours before. There was no testimony here as to a warrant. We wouldn't be going through this if there was a warrant, would we, so why do you ask this?

MR. CLARK: Your Honor, I'm trying to establish as to each witness they did not have a warrant.

THE COURT: But I know they don't have a warrant and the record doesn't indicate that there is a warrant.

MR. CLARK: And additionally that Mr. Walberg was not committing a crime.

THE COURT: That I know.

MR. KLINKOWITZ: I'll stipulate as to the fact he wasn't committing a crime.

THE COURT: I know all of this, you don't have to bring it out again. There is nothing in the record that says he was committing a crime or that there was a warrant.

MR. CLARK: Then we arrive —

THE COURT: You are just talking a lot, now come on now, ask him some pertinent questions.

Answer 0:92-93

* * * * * *

Q [by Mr. Clark] Was Mr. Walberg at any point left in the custody of a uniformed police officer?

THE COURT: At what point?

MR. CLARK:

Q After the interrogation had commenced and prior to its end?

A He may have been, sir, I don't know.

Q Did you yourself at any point absent yourself from this man next to me after the commencement of this interrogation and prior to its conclusion?

THE COURT: In other words did you ever leave the room?

THE WITNESS: Yes, sir.

THE COURT: So simple.

Answer 0:122.

* * * * * *

MR. KLINKOWITZ: As to the arrest, as to the physical evidence, the I.D. and the statements, the state rests subject to rebuttal.

THE COURT: Are you going to offer any testimony Mr. Clark?

MR. CLARK: I would like to, we are going to call Mr. Gottsch.

THE COURT: Gottsch.

MR. KLINKOWITZ: Do you have him under subpoena?

MR. CLARK: No, you do, you directed him to be back here this afternoon.

MR. KLINKOWITZ: It's news to me.

MR. CLARK: Is he on the premises?

MR. KLINKOWITZ: Nope.

MR. CLARK: We will have to subpoena him for tomorrow then. We call Mr. Walberg.

THE COURT: Why didn't you subpoena him if you planned on calling him?

MR. CLARK: Well, Your Honor, he was under subpoena.

THE COURT: Yes, for the trial.

MR. CLARK: He was present today.

THE COURT: I know, but we are not going to have a trial today, he doesn't have to be here. Come on, sir.

Answer 0:125-26.

* * * * * *

Q [by Mr. Clark] While you were being interrogated, Mr. Walberg, were you tired?

THE COURT: Yes.

THE WITNESS: Yes.

THE COURT: Sure.

MR. CLARK:

Q Were you well rested?

THE COURT: No.

THE WITNESS: No.

THE COURT: I know. I can answer those questions, Mr. Clark, as you are asking them. They are obvious answers.

MR. CLARK:

Q What was your mental frame of mind during this interrogation?

THE COURT: Disturbed, worried.

THE WITNESS: No, more disgusted than anything else, Your Honor.

MR. CLARK: Nothing further.

Answer 0:140.

* * * * * *

THE COURT: Is that your picture there in Exhibit 1?

THE WITNESS [Mr. Walberg]: Yes.

THE COURT: That skinny fellow there.

THE WITNESS: If you check the booking, Your Honor, you will find the weight recorded and the height.

THE COURT: Okay, anything else, Mr. Clark?

MR. CLARK: No, sir.

(Witness steps down.)

THE COURT: You rest?

MR. CLARK: Well, the exception of —

THE COURT: You don't think I'm going to bring that — what do you hope to get from that person? You don't even know what that person is going to testify to.

MR. CLARK: I want to have his evaluation, be able to question him as to what occurred at the line-up, Your Honor. I wasn't there.

THE COURT: Well now, you want me to put this over at great expense. We have spent the whole day here now today. It's now 4:22, 4:23, since 8:30 this morning you have been on this case. This is the first time that it's taken me all day to go through a few simple motions. What happened at the line-up, you heard what happened at the line-up.

MR. CLARK: Well, I would like to query the individual who made the identification.

THE COURT: Well, you didn't bring him, you haven't subpoenaed that person.

MR. CLARK: Is he under Mr. Klinkowitz' subpoena for tomorrow, continuing subpoena?

MR. KLINKOWITZ: No.

MR. CLARK: Is he going to be here tomorrow, did you request his presence?

MR. KLINKOWITZ: It's my understanding, counsel, you were asking.

THE COURT: You asked for an adjournment, which I'm going to give you, for this trial, and he's excused his witness.

MR. CLARK: Do you wish — apparently you don't wish further argument as to the need for a continance [*sic*], judge.

THE COURT: For what? For continuance, no, I'm going to give you the continuance for the trial but I want to dispose of the motions today. If you just want to go on a fishing expedition that's something else. I don't think that that's the way we should run a courtroom, see what another witness is going to say, especially since you didn't subpoena that witness for this motion.

MR. KLINKOWITZ: Judge, might I make a suggestion, that, I don't know, you rest on the motion to suppress, the motion on the I.D., and the motion on the arrest.

THE COURT: No, he's not resting on the motion, on the I.D.

MR. KLINKOWITZ: I misspoke. As far as the confession, the arrest, and the physical evidence is concerned, Mr. Clark, do you have any further evidence on that?

MR. CLARK: No, we do rest as to the motion just cited by Mr. Klinkowitz, the arrest, the physical evidence, and the Goodchild.

MR. KLINKOWITZ Might I suggest this, that we argue those motions and hold open the I.D. on the date of trial.

THE COUR' : All right, I'll permit him to examine Mr. Gottsch as to his portion of the I.D. on the date of the trial. Now as to the other three motions what you want me to believe, Mr. Clark, is that three officers got up here today, or four, and perjured themselves, number one; that these two officers, Leffler and Wiesmueller did not notify this man of his constitutional rights under Miranda. First of all he has been in jail, or arrested often enough he ought to know them better than the officer from what I have just heard here from the stand. Number two, you want me to believe that he wasn't wearing the short coat as the officer, three officers testified but was wearing a long coat. You want me to believe that he wasn't anywhere near the automobile when the officer arrested him, as the

officer testified. You want me to believe he didn't make any statement at all — oh, that he was denied, that he was denied toilet facilities, that he was sort of, made some promises sort of. He didn't get to the point to say that, but they were having some talk back and forth. That he asked for a lawyer and these officers denied him a lawyer, three officers, or two officers, have now perjured themselves about the request for a lawyer. You want me to believe all that?

MR. CLARK: Well, Your Honor, I'm not certainly accusing anybody of perjury, I don't think that that is, certainly it's not my position to evaluate.

THE COURT: I mean do you want me to believe that the officers have all gotten up here and have lied and Mr. Walberg has told the truth on all of those points, and I meant several others, and you saw his demeanor on the witness stand as he was being asked questions.

MR. CLARK: Well, Your Honor, I'm submitting that as my evidence on these motions. I think in terms of the application of the law that they are realistically and genuinely — was not probable cause to take Mr. Walberg into tow.

THE COURT: I'll tell you what I have heard, I have heard that on December 12, 1977 a burglary was reported by a Mr. Gottsch. Mr. Gottsch is approached by police and Mr. Gottsch gives the following description to Mr. Wiesmueller as far as Mr. Walberg is concerned: That this man is about fifty, a white male about five nine, 150 pounds, short dark grayish hair with wash and wear pants, with a short jacket. That he gave the other description of Mr. Damagalski and I didn't write down the description of Damagalski, but also the blue automobile with a certain license plate was involved in this burglary with these two men. Within two hours the police have surrounded, after they get this, surrounded this automobile at 827 West Maple Street, see Mr. Damagalski, who is well known to them, come out, and they see Mr. Walberg come out matching this description, this general

description that Mr. Gottsch gave Mr. Wiesmueller. And the police officer — I forget his name, the one, the third police officer that testified with the blue suit —

MR. KLINKOWITZ: That would be Mazurek.

THE COURT: — said he saw him by the car, he recognized him as being one of the men that he had gotten a general description of, and he placed him under arrest. Now I find that there is probable cause for the police officer, Mazurek, to make the arrest of Mr. Walberg at that time.

MR. KLINKOWITZ: Your Honor, Officer Mazurek made the original apprehension and Haas is the man —

THE COURT: Well, Haas then I'm talking about.

MR. KLINKOWITZ: In civilian clothes approached.

THE COURT: I'm talking about Haas, the man who approached him, the man I asked "Who made the arrest?" He said he was within inches of the car, Haas made the arrest, right. That's what we have there and I think there is probable cause and I'm going to make that finding as far as the motion to suppress evidence. I'll hear you on that now.

MR. CLARK: One further comment, Your Honor, if I may just briefly submit in reference to the arrest of, the actual arrest and apprehension of Mr. Walberg. He was not committing a crime, it was a — there was no reason to indicate that Walberg, until he was checked out, was acting in any suspicious fashion. That the description that we have here, Your Honor, by Your Honor's own comment earlier this afternoon, could fit a lot of citizens.

THE COURT: I know that but isn't that true of every description?

MR. CLARK: His clothing.

THE COURT: Clark, I stop you. I made a ruling on that. I made a ruling, but isn't that true of every description that somebody gives to the police unless they have got a picture. Isn't that true? I'm asking you now as

a lawyer and as an officer of this court, doesn't every description given by a victim or some witness fit twenty million other people?

MR. CLARK: Yes, sir.

THE COURT: All right, then don't give me this bull. I made my ruling. You are no Clarence Darrow and no one else is either. We use common sense here and the police had common sense, probable cause to make an arrest on this date at this hour of this man, who was with a known burglar who unfortunately isn't going to be tried in this court. Now I said do you have anything to say about the physical evidence and you went off on some other tangent, and that's why I'm getting awfully irritated at you, Mr. Clark. I want you to protect this man's rights within the law. Your job is not to get him out on the street your job is to protect him. You win when you are protecting his rights but you don't necessarily lose if he's convicted.

MR. CLARK: Well, Your Honor is obviously aware I'm presumtively [*sic*] representing him to the best of my ability.

THE COURT: I know, but that's a damn excuse given by every public defender and every lawyer in this town, I'm protecting him to the best of my ability. How can you answer that question? When Judge Sullivan said the other day all these motions are filed by the public defenders, their answer was we are defending the rights of our clients. Well, you can't answer that. But there are certain — you don't go to any lengths, you go with reasonable lengths, at least that's the way I was taught to practice law, and that's what Younger says when you cross examine, and I suggest that you read those rules of Mr. Younger. Can we get to the physical evidence now please. Should I suppress the physician [*sic*] evidence? It was within sight of the police officers, wasn' [*sic*] it, when they made the arrest and made the arrest of Mr. Damagalski. First of all what rights of his were violated, the automobile belonged to Mr. Damagalski, didn't belong to him.

MR. CLARK: I would contend there, Your Honor, that Mr. Walberg never was in proximity to this automobile, that the automobile was registered to apparently Mr. Damagalski, Damagalski was the only one in the car, there hasn't been any testimony that Mr. Walberg was ever inside this automobile.

THE COURT: Sure there is, Mr. Gottsch, Mr. Gottsch said these men got into the automobile and drove off.

MR. CLARK: Well, I think there is a time lapse in the so-called chain problem, judge. Additionally, I would content [*sic*] based on the lack of probable cause for the arrest that any subsequent search, custodial search and a pat down by the officer afterwards, at which time the shaded flashlight, the gloves, the hacksaw blade and the glasses were removed from Mr. Walberg.

THE COURT: We are talking about the property now.

MR. KLINKOWITZ: That property.

THE COURT: We are not talking about the property that was found in the automobile.

MR. KLINKOWITZ: I'm getting to that. The state would submit that those, the state intends if the Court rules favorably for the state, to introduce those items at the trial.

THE COURT: There is no question about that, I was thinking more of the property now. The only argument there could be, would be the argument about the property in the car.

MR. KLINKOWITZ: The defendant was observed by Mr. Gottsch getting into the automobile that was described by license number, color, and make. That automobile was found parked behind Mr. Damagalski's house some two hours later in plain view within the automobile with the instrumentalities of the burglary, at least one of them lying on the floor of the front seat, namely, a pinch bar that was seized. The blue bag containing other tools was in plain view in the front seat

on the floor. That was seized. In the back seat was a gym bag that had been described by Mr. Gottsch as an item taken from his apartment that did not belong there, that was not one of the items, one of the chattels kept within that apartment, but that he saw the two men who he later identified as Walberg and Damagalski remove from the apartment or take with them when they retrieved a cardboard box and a black gym bag. The cardboard box and black gym bag were observed in the back seat of the automobile in plain view, they as well seized by the police.

Now the constitution prohibits unreasonable searches and seizures. Here the matters were in plain view. The car was in police custody, the seizures were made of items in plain view within that vehicle, the same vehicle the defendant, Walberg, had been observed getting into immediately following the burglary in the apartment. I don't see anything unreasonable about that search or — pardon me, it's not a search it's merely a seizure.

THE COURT: Motion to suppress the evidence is denied and of course the motion to suppress the statements is denied. There is no question beyond all doubt as far as I'm concerned that the police did advise this gentleman of his rights, didn't threaten him, didn't deny him any comforts that he requested, and that he gave this without any force or coercion, the statement that he gave on the evening of the twelfth, without any force or coercion, and that statement may be introduced at the trial.

MR. KLINKOWITZ: Thank you, Your Honor.

THE COURT: April 17, the trial.

Answer 0:147-57.

* * * * * *

TRANSCRIPT OF PRETRIAL HEARING
ON JUNE 19, 1978 (Answer N:1-11)

STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY
BRANCH 11

STATE OF WISCONSIN,
Plaintiff,

vs.

ROBERT EDWIN WALBERG,
Defendant.

Further Proceedings

J-1782

June 19, 1978

Before the
HON. CHRIST T. SERAPHIM,
Circuit Judge, Branch 11,
Presiding.

CHARGE: BURGLARY (PARTY TO A CRIME).
POSSESSION OF BURGLARIOUS TOOLS.
HABITUAL CRIMINALITY.

APPEARANCES:

MR. RICHARD KLINKOWITZ,
Assistant District Attorney, For The State.
MR. DONALD CLARK, For The Defendant.
DEFENDANT PRESENT IN COURT.

* * * * * *

THE COURT: Who is going to — what is it, Mr. Klinkowitz?

MR. KLINKOWITZ: Judge, this matter was set, I believe, several times last week for trial. There were numerous problems. According to -- Mr. Walberg claimed physical disability in Waupun. He was sent to the hospital, returned. He is here today. I believe the matter is set today for further proceedings. As the Court may be aware, Mr. Walberg is involved —

THE COURT: I'm aware of it. What do you want?

MR. KLINKOWITZ: I would ask — okay, Judge. Since last week, Mr. Donohoo has been to Madison —

THE COURT: Yes.

MR. KLINKOWITZ: — spoken with Judge Beilfuss, Mr. Clark. It would appear that if this case were set for trial in Milwaukee County Judge Beilfuss would be inclined to sign an order for a stay until the change of venue problem can be litigated. It would be the position of the State that this case must be tried before the 28th of June because of problems that might attend to it as a result of Mr. Walberg's testifying before the Police and Fire Commission of the City or Village of Fox Point.

I would therefore ask that the Court take the steps necessary to find a courtroom and jury in another county and try this matter forthwith, hopefully before the 28th. I would suggest to the Court, if the Court can meet the schedule, Thursday or Friday of this week. That would alleviate the problem imposed by Judge — Justice Beilfuss and it would facilitate the movement of this case through the Court prior to the 28th of June, which is the date that Mr. Walberg is scheduled to go before the Police and Fire Commission.

THE COURT: I will call the Court Administrator right now.

MR. CLARK: Okay. If Your Honor please, I would just insert that after arguments last Thursday and after

the return from the Supreme Court of myself and Mr. Donohoo, Your Honor considered my arguments, considered the arguments of the District Attorney, the case citations of the District Attorney and ruled against the defense —

THE COURT: Yes.

MR. CLARK: — of this matter. Mr. Klinkowitz is now asking — turning around and in the face of his former arguments and is asking for Your Honor to reverse himself. Your Honor, in terms of my approach and tactics to this case, I would like to defend upon certain constants. I feel —

THE COURT: You want to try it in this county or in another county?

MR. CLARK: Well, I had moved for a change of venue, Your Honor, but I wanted to defend upon your ruling last week.

THE COURT: Come on. I'm right. You can't win this one, but I don't want you to stall it. That's the only reason I'll change. I'm right on the law. No court in the land would reverse me on this one, change of venue, impossible. Now, do you want to try it here in this county or in another county?

MR. CLARK: I had moved for a change of venue.

THE COURT: Do you? All right. Then we'll —

MR. CLARK: Are you asking me? Your Honor, are you asking me to withdraw my motion? Are you posing it in that fashion?

THE COURT: No, no. I am not telling you to do anything. I am asking you whether you wanted to try it in this county or in another county. You said in another county. I will get you another county.

DA, would you make the call for me?

(A recess.)

THE COURT: All right, Gentlemen, will you step up, please?

MR. CLARK: Your Honor, I also have a motion.

THE COURT: What is your motion?

MR. CLARK: Your Honor, based on the events of this morning, I filed a motion with the Court and would move Your Honor to recuse himself as the trial judge in this matter and refer this matter back to the Clerk of Circuit Court for reassignment.

If Your Honor may recall, there was an exchange of words. Words were said by the Court to defense counsel in this matter, and particular, the Court's final statement to myself, which I wrote down immediately, was, "I am going to fix you on the trial of this case." There were —

THE COURT: If you —

MR. CLARK: There were other state —

THE COURT: If you what? Finish it.

MR. CLARK: That's what I took, Your Honor.

THE COURT: There was more than that, sir. This trial in this case, if I may use the vernacular, horsing this case around, we are going to try this case. I am not going to recuse myself. I have now made arrangements, Mr. Clark, and I am ashamed of you, the man who came to me and asked me to put him in a law office, which I did, when you were a lawyer, and I did which you thank me for. I put you, when you graduated, into the District Attorney's Office and kept you there when you came and asked me that, and I had you in the District Attorney's Office. I have appointed you in this case. I'm a good friend of your mother's, a good friend of your sister's, and I was a good friend of your father's.

MR. CLARK: I appreciate —

THE COURT: Just let me finish, sir. It is that attitude, sir, that attitude, sir, that is going to get you nowhere in the Courts of Milwaukee as long as I'm around.

I will show no prejudice to this defendant. He's going to get a fair trial. The best thing that can happen to this defendant is that if I do not give him a fair trial, because this case will probably never be tried again if I make a mistake. I'm not going to make a mistake. This case is going to be tried. It's going to be tried three days from now, Mr. Clark.

Your motion is denied. This case will be tried on Thursday morning at 9:00 o'clock in Fond du Lac County in Judge Murphy's courtroom.

MR. CLARK: May I make an offer of proof, Your Honor?

THE COURT: You are going to try this case, Mr. Clark.

MR. CLARK: Okay, Your Honor. I wish —

THE COURT: I have no prejudice against you except the methods that certain lawyers use, that you have used, that I disapprove of. I have no personal personal [*sic*] prejudice against you. Now, this — you know I'm a hard line judge on these matters. I want to see my cases tried. I will — the record will speak for itself as to whether I will hold prejudice against you.

MR. CLARK: I understand that, Your Honor. For the record, I would like to inform Your Honor and Mr. Klinkowitz that I will be going to the Supreme Court to seek an order to show case [*sic*] and a restraining order against Your Honor, and also, rather, a writ of prohibition, mandamus or habeus [*sic*] corpus or what other relief may be —

THE COURT: Can't you name a few more, Mr. Clark? Mr. Clark, I personally — and I will put this on the record — am very ashamed of your conduct in this case, because you don't want Mr. Walberg tried, do you? Do you? I'm asking you a question.

MR. CLARK: Well, Your Honor, I'm —

THE COURT: You asked me to give you a change of venue, and I did. Do you want Mr. Walberg to get a trial?

MR. CLARK: I would like him to get a fair and impartial trial.

THE COURT: Well, you are going to get one, but not if you keep bringing motions, I will tell you this. I'm not going — don't ever come to me with your bill on this thing, because I am not going to pay for all these motions that you are bringing up in the Supreme Court. I am not going to pay for them because I think they are unnecessary. I will tell you now.

MR. CLARK: Well, I have a duty to bring them, Judge.

THE COURT: You have no duty to bring them. Every lawyer can say that about any motion he brings. "I'm defending my client."

Do you wish to say anything for the record, Mr. Klinkowitz, to clear up this colloquy between lawyer and Judge at the side bar when he came up and said, "Did you speak to the Judge," which was an insult to the Court. The District Attorney had not made any comments to me at all. He didn't even talk to me today.

MR. KLINKOWITZ: Judge, I —

THE COURT: And it was an insult to this Court what you did, suggesting that the District Attorney had conferred privately with the Judge without you being present.

MR. CLARK: Your Honor, I asked him directly to his face off the record on the side.

THE COURT: And my statements were off the record. I said them to you off the bench, and for you to say that I am prejudice [*sic*] against you and that this man can't get a fair trial is an abominable lie.

MR. KLINKOWITZ: Judge, if I may, I would only like to say this: That the question that the Court has alluded to was asked of me by Mr. Clark. I had not seen this Court in any capacity for two weeks, having just returned from two weeks off because of military obligations. The only time I had seen this Court today was when the Court was on the bench.

THE COURT: Of course.

MR. KLINKOWITZ: I had no conferences with you, nor to my knowledge did anyone from the District Attorney's Office.

THE COURT: No, but Mr. Clark evidently is going to practice law this way, if he doesn't get his way, that there is some conspiracy between the prosecutor and Judge and heaven knows who else.

Now, you be ready for trial Thursday morning. No Supreme Court, I'll assure you, is going to grant you [*sic*] motion on this, and you better be ready to finish this trial in two days, because it is a simple burglary.

MR. KLINKOWITZ: Judge, there remains a matter of the Wade hearing when the Court's calendar facilitates the finishing of that hearing prior to going to Fond du Lac Thursday.

THE COURT: We will finish it in this courtroom.

MR. KLINKOWITZ: When will that be?

THE COURT: Whenever you want it, sir.

MR. KLINKOWITZ: Wednesday afternoon.

THE COURT: Why don't we do it tomorrow?

MR. KLINKOWITZ: It's fine with me.

THE COURT: Tomorrow morning at 8:30.

MR. CLARK: Well, Your Honor, as to the Wade, the only witness that — Mr. Leffler has already been queried

and questioned as to that. It would just be the victim, Mr. Gottsch. I assure the Court I don't have many questions to ask him. I don't think it would take an undue amount of time, so Thursday —

MR. KLINKOWITZ: I do have a problem with him, with the Albert Carlson case, in front of Judge Wedemeyer.

THE COURT: I'll do it Wednesday morning.

MR. KLINKOWITZ: All right.

THE COURT: My statement to you is that you were not going to horse this case around.

MR. KLINKOWITZ: Judge, is the trial set for 8:30 on Thursday morning in Fond du Lac?

THE CLERK: 9:00 o'clock.

MR. KLINKOWITZ: 9:00 o'clock.

THE COURT: I will assure you of one other thing. Might as well put everything on the record, because this Court always speaks his mind. I will never waste the taxpayers' money again. I assure you.

* * * * *

STATE OF WISCONSIN)
) SS:
COUNTY OF MILWAUKEE)

I, Carol A. Pacetti, hereby certify that I have carefully compared the foregoing with the stenotype notes taken by me on these proceedings and that the transcript hereto annexed is a full, complete and correct record of all proceedings had.

/s/Carol A. Pacetti
Official Court Reporter
Circuit Court, Branch 11

EXCERPT FROM TRANSCRIPT OF PRETRIAL HEARING ON JUNE 21, 1978 (Answer 0:159-61)

THE COURT [Seraphim, J.]: We are here to complete a Wade hearing, I believe.

MR. KLINKOWITZ: Yes, judge. Judge, yesterday afternoon the Court was in the process of a discussion with Mr. Clark on what had been said by the Court at the conclusion of this mornings [*sic*] — at the conclusion of yesterday morning's trial — I should say hearing, in this matter. I have examined the transcript of those proceedings had yesterday morning and afternoon and I noted in the transcript that the Court had started to explain or to state to Mr. Clark that he, Mr. Clark, had taken your statement out of context as to what was going to occur at the trial of this matter. Yet during that explanation the Court was side-tracked into a discussion of a prior knowledge of Mr. Clark's mother, father, and himself, and for the record, since I am faced with taking this question to the Supreme Court this afternoon, I would like the Court to lay down or to state in full the context in which the closing statement was made yesterday.

THE COURT: Well, I believe you heard it, Mr. Klinkowitz.

MR. KLINKOWITZ: I did, as did Detectives Loeffler and Weismueller.

THE COURT: Number one —

MR. KLINKOWITZ: It has been alleged by Mr. Clark you were going to fix him in the course of the trial.

THE COURT: You know that's not what the Court said, even though Mr. Clark said he wrote it immediately. He did not write it immediately. There was an outburst or colloquy between the Court and Mr. Clark at a previous hearing that we had, as I recall, and I don't remember

exactly what it entailed. I think it was during this Wade hearing, wasn't it, some month or something, so —

MR. KLINKOWITZ: Was my understanding.

THE COURT: I just want to bring it out that we did have, and I told Mr. Clark I was going to control the trial. The exact words I do not know but as I recall I had gotten myself off the bench. Was that yesterday or the day before?

MR. KLINKOWITZ: Yesterday.

THE COURT: I thought it was the day before — it was the day before yesterday, it was Monday.

MR. KLINKOWITZ: All right, excuse me, Monday.

THE COURT: Monday, and I observed Mr. Clark come up to you and I asked what was going on and Mr. Clark — and I was informed Mr. Clark asked you or told you or suggested or whatever it was that you had talked to me prior to the court opening on the question involved, and you stated to him that you had not, and I stated you had not. And of course that angered the Court that Mr. Clark would even suggest that the District Attorney and the Court would be discussing this case and strategy out of his presence, and I told Mr. Clark that I didn't approve of his tactics and that if he continued his tactics during the trial I was going to take care of him, and that was the context in which I stated it, not that I was going to get him, as he stated it very briefly. Now that — can you tell me from your knowledge of your memory exactly what my words were, Mr. District Attorney.

MR. KLINKOWITZ: My recollection was that you indicated at the conclusion of your statement to Mr. Clark that you would control this trial and that you would control Mr.Clark during the trial and not allow the type of conduct that had preceded his actions yesterday.

THE COURT: Of course, that was the action and intent of the Court. I will state I have no personal

prejudice against Mr. Walberg or Mr. Clark and the way the Court handled the situation is the way I handled every attorney for eighteen years who has acted up in my court, friend or foe. Now I have had my say and we will go on with this hearing.

(The Wade hearing then continued.)

* * * * * *

EXCERPT FROM TRANSCRIPT OF HEARING ON POST-CONVICTION MOTION UNDER WIS. STAT. §974.06 (Answer P:14-21)

STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY
CRIMINAL DIVISION — BRANCH 6

CASE NO. J-1782

STATE OF WISCONSIN,
Plaintiff,

vs.

ROBERT EDWIN WALBERG,
Defendant.

March 10, 1981

Before Hon. Robert W. Landry
Circuit Court Judge

CHARGE: Burglary (PTAC)
Possession of
Burglarious Tools (PTAC)
Habituatl [*sic*] Criminality

PROCEEDINGS: Post Conviction Motion

DISPOSITION: Motions denied.

APPEARANCES:

K. WAYNE CUMMINGS, Asst. District Attorney, appearing on behalf of the State.

WILLIAM J. TYROLER, Asst. State Public Defender appearing on behalf of the Defendant.

ROBERT OTT, Asst. Corporation Counsel, appearing on behalf of Thomas Zablocki.

Defendant present in court.

....

MR. TYROLER: Well very briefly summarized, your Honor, my position is that the trial court exhibited bias against the defense, that there are numerous demonstrations of that bias. They are recounted in the brief. I think they are fairly self-evident and in some instances fairly aggregious (phonetic spelling.)

The attorney did make a recusal motion, and the trial judge denied it. I would point out additionally, your Honor, subsequent to my writing the brief, I discovered that some of these incidents had been made part of the allegations against the trial court, and the disciplinary proceedings specifically found it violated the cannons [*sic*] of judicial ethics by the court of appeals judicial conduct panel in the court of appeals, and I would simply add that to my argument at this point that that substantiates my point that the trial court did, in fact give out at the minimum, appearance of partiality, which I think is the test that a reasonable person would come to, the inevitible [*sic*] conclusion that there was prejudice against the defense and it was exhibited by the trial court. I'll rest on that point unless your Honor has further questions.

THE COURT: Mr. Cummings.

MR. CUMMINGS: Your Honor, in reading the rather lengthy brief by defense counsel, this was a trial before Judge Seraphim. Many of the comments made that are printed within the body of the brief were made outside the presence of the jury. It's the state's position that although the court may have been rather forceful in its rulings that the court was, in fact, impartial and that the court provided the defendant with a fair trial.

THE COURT: In this portion of the defendant's motion for relief, I believe that this is a 974.06 motion, in which the defendant is frankly seeking relief on the basis of failure of due process, that is, he was denied basic

essentials and ingredients of a fair trial. This goes to the very heart of the whole judicial system and one that frankly I believe an appellate court has to deal with.

It is true that 974.06 motions are addressed to the trial court, but it is almost as if one judge, in this instance a new and different judge, is passing on the mannerisms and manner in which another trial court acts in a particular case.

The brief filed by defense counsel shows example after example of points in the proceedings involving this defendant where the court chastised his attorney. He complained about his dilly-dallying tactics and was particularly provoked about his verbosity and the tendency on the part of defense counsel to bring up motions that he considered to be irrelevant and was not at all indirect in his criticism that he focused on defense counsel.

The district attorney concedes that statements used by the court were forceful. You could possibly even go further. However, it does appear that most of these matters, if not all of them, and I'm not clear whether some of them were in the presence of the jury or not, but I do know most of them and much of the colloquy that occurred between counsel and the court were out of the presence of the jury on motions.

MR. TYROLER: That's correct, your Honor.

THE COURT: I think this in effect is quite critical. It is in fact part of the judge's role to maintain discipline in his courtroom and in some instances to train lawyers and criticize them for the manner in which they are conducting their business in court if the judge is one of the opinion that it is inappropriate and does not further the ends of justice. Some judges take this upon themselves more vigorously than others, and it is well known that Judge Chris [*sic*] Seraphim, in fact, resorted to this technique to speed up cases in his court, and in fact it resulted in his trying cases in a fraction of the time that it took many of the rest of us to try cases.

He was very outspoken when it came to dealing with attorneys in his courtroom. That in and of itself does not constitute a violation of due process. When it becomes aggregious [*sic*], I believe that is the word used by Mr. Tyroler, then by all means I believe that argument should be made possibly to the court of appeals or to an appropriate forum. The language used does not necessarily discriminate against the defendant. A typical example is found on Page 10, and I can almost hear the judge saying this. I wouldn't attempt to use his style.

"THE COURT: Clark, I stop you. I made a ruling, but isn't that true of every description that somebody gives to the police unless they have got a picture. Isn't that true? I'm asking you now as a lawyer and as an officer of this court, doesn't every description given by a victim or some witness fit twenty million other people?

MR. CLARK: Yes, sir.

THE COURT: All right, then don't give me this bull. I made my ruling. You are no Clarence Darro [*sic*] and no one else is either. We use common sense here and the police had common sense, probable cause to make an arrest on this date at this hour of this man, who was with a known burglar who unfortunately isn't going to be tried in this court. Now, I said do you have anything to say about the physical evidence." etcetera, etcetera. It continues on the same vein and he is rather outspoken in his attitudes on the merits of the issue being raised.

MR. TYROLER: There are later comments as well which are of main concern to me.

THE COURT: In this particular paragraph?

MR. TYROLER: On the bottom of page 11.

THE COURT: On Page 11, there is under a different heading —

MR. TYROLER: The last paragraph.

THE COURT: Point 11?

MR. TYROLER: Yes, specifically where the judge indicates he's not going to recuse himself.

"... I have now made arrangements, Mr. Clark, and I am ashamed of you, the man who came to me and asked me to put him in a law office, which I did, when you were a lawyer, and I did which you thank me for. I put you, when you graduated, into the District Attorney's Office and kept you there when you came and asked me that, and I had you in the District Attorney's Office. I have appointed you in this case. I'm a good friend of your mother's, a good friend of your sister's, and I was a good friend of your father's."

And then he continued,

"It is that attitude, sir, that attitude, sir, that is going to get you nowhere in the courts of Milwaukee as long as I'm around."

And he states he is not going to pay the bills for the motions. I think that goes beyond controlling the questioning and controlling the activities of the courtroom. I think that is a personal animus directed specifically against the defense attorney and by implication against the defendant as well.

THE COURT: I don't read that into it, Mr. Tyroler. The fact is maybe it's based upon my personal contact with the person in question, that is, the very next day this same judge could get along well with this particular individual without any animus. The question is how did this effect [*sic*] Mr. Walberg in his cause. I look through this matter and I look through other records in the same vein, and I know that sometimes jurys [*sic*] fall in love with the judge, sometimes a jury falls in love with an attorney that they are impressed with and the words of an attorney are very frankly given much weight, sometimes even greater weight than the evidence inthe [*sic*]

case. This is likewise true of judges, the respect given by a jury to a judge, and it's essential and critical that we maintain a very neutral aspect especially in criminal cases where there are jurors present.

I don't see any evidence, however, that this spillover occurred in this case. I'm also aware of the fact that sometimes when judges react and make a personal attack upon an attorney that it can work to that attorney's advantage, but in any event, based upon this record, I am not convinced or satisfied at all that there has been any deprivation of rights or violation of due process. I do recognize that the record is one that is not an example for judges to follow. I have read records of my own in which looking back on them, I'm somewhat shocked but that however does not mean that the defendant is entitled to the relief of a new trial.

Motion is denied.

MR. TYROLER: Thank you, Judge. I'll prepare a written order.

* * * * * *

EDITOR'S NOTE

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ORIGINAL

SUPREME COURT U.S.
OCT 25 1985

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

Case No. 85-331

THOMAS ISRAEL, and
WISCONSIN ATTORNEY GENERAL,

Petitioners,

v.

ROBERT WALBERG,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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v.

ROBERT WALBERG,

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Robert Walberg respectfully requests denial of the petition for writ of certiorari, seeking review of the opinion reported as follows: Walberg v. Israel, 766 F.2d 1071 (7th Cir. 1985).

JURISDICTION

Respondent doesn't take issue with petitioner's statement of jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent agrees with petitioner's statement of same.

STATEMENT OF THE CASE

Petitioners' recitation of facts is accurate as far as it goes, but nonetheless omits certain pertinent facts. Respondent's statement herein is therefore intended to supplement petitioners'. (From respondent's perspective, petitioners incompletely portray, inter alia, the judicial threats to trial counsel's economic status.)

During the presentation of evidence at the suppression hearing, the presiding judge, Honorable Christ T. Seraphim, several times interrupted defense counsel, Donald Clark, and in the words of the state supreme court, Judge Seraphim "expressed irritation with defense counsel because he believed he was wasting the court's time and the taxpayer's money with 'frivolous' objections and motions, and with his habit of asking too many questions." State v. Walberg, 109 Wis. 2d 96, 98, 325 N.W.2d 687, 689 (1982).

Judge Seraphim accused Clark of "running up a bill of thirty dollars an hour." Answer: Exh. O: 84. The judge spontaneously criticized a prosecution witness who gave evidence favorable to the defense theory. Judge Seraphim also told this witness that a prior prosecution witness had given different testimony, even though the judge had previously imposed a sequestration order. Answer: Exh. O: 85.

During respondent's direct examination, the judge sarcastically interposed his own answers to questions relating to respondent's mental and physical condition during interrogation. Answer: Exh. O: 140. See also 766 F.2d at 1073. In petitioner's view, these remarks "allegedly ridicul(ed) Walberg's testimony," and were but evidence of the judge's "blunt style." Petition for Writ of Certiorari, pp. 10, 11. However, the Seventh Circuit viewed it as "his

bizarre conduct in answering questions put to Walberg before Walberg could answer . . . ." 766 P.2d at 1077.

During argument on the motion to suppress, the judge badgered Clark into stating, "as an officer of the court" an opinion unfavorable to the defense theory. Judge Seraphim reiterated that he was "getting awfully irritated at you Mr. Clark." Answer: Exh. O: 152-154. The judge referred to the codefendant being tried separately as "a known burglar who unfortunately isn't going to be tried in this court." Id.

Petitioners do recount the most serious judicial outburst. Pet., pp. 11-16. However, petitioners don't mention that the Wisconsin Supreme Court held that this conduct violated Standards 6 and 9 of the Wisconsin Code of Judicial Ethics. In Matter of Complaint Against Seraphim, 99 Wis. 2d 485, 294 N.W.2d 485 (1980) (see 99 Wis. 2d at 490, 294 N.W.2d at 489 for a description of these Standards). Answer: Exh. K: 11-12. For this, and egregious misconduct in other cases, Judge Seraphim was removed from the bench for three years by the Wisconsin Supreme Court.

At his disciplinary hearing, Judge Seraphim was questioned about his behavior in the present case. He told the disciplinary panel "that he intended to put defendant's counsel on notice that he was not going to pay him for bringing motions that had no merit . . . ." The panel also noted: "When respondent told counsel that his conduct would get him nowhere in the courts of Milwaukee, he intended to let counsel know that he was going to tell other judges how he practiced law." Answer: Exh. K: 11.

In this regard, though petitioners don't mention it, Clark's status was as a judicially appointed counsel for respondent. Under the then-existing system (since supplanted

by a state-wide public defender system), attorneys were appointed for indigent criminal defendants by local judges. The appointing judge was also responsible for approval (or rejection) of appointed counsel's post-trial bill for services. See generally, States ex rel. Milwaukee County v. WCCJ, 73 Wis. 2d 237, 243 N.W.2d 485 (1976). As one state supreme court justice has noted, "(t)here may have been deficiencies in [this] system, including allegations of patronage . . . ." State v. Pelton, 110 Wis. 2d 485, 520, 329 N.W.2d 161, 177 (1983) (Steinmetz, J., concurring).

Petitioners don't really discuss the state supreme court's affirmance of respondent's conviction. The court found that Judge Seraphim erred in failing ro recuse himself, and that respondent was thus denied his right to an impartial judge. Nonetheless, the court found this error harmless (respondent had contended, inter alia, that the harmless error rule was inapplicable to a denial of the right to an impartial judge). 109 Wis. 2d at 108, 325 N.W.2d at 694.

The state supreme court summarized the net effect of Judge Seraphim's unethical conduct in the following terms:

> The court in effect, was telling defense counsel he must choose between bringing the motions and obtaining a fair trial for the defendant. He further appeared to be threatening counsel's personal and economic interests if he continued defending his client by bringing motions and voicing objections.

109 Wis. 2d at 108-109, 325 N.W.2d at 694.

The Seventh Circuit's decision is discussed more fully below. Respondent disagrees with petitioners' interpretation that the decision articulates a novel standard dealing with "governmental rectitude." Rather, as argued below, the decision merely finds the existence of a conflict of interest based on the express judicial threats to counsel's economic and professional stature.

Finally, petitioners' statement of facts implies that counsel's motion practice was "caviling" and dilatory, and that Judge Seraphim was only motivated by an interest in moving the case along. Petition for Writ of Certiorari, p. 10. However, the Wisconsin Court of Appeals "conclude(d) that Walberg's counsel responded coolly, calmly, and courteously to the trial court's onslaught . . . ." Answer: Exh. I: 3. Further, the judicial disciplinary action implicitly exonerated counsel of any blame for the judge's behavior. Standard 9 allows a judge to "properly intervene whenever he considers it necessary to . . . expedite the proceedings." In finding a violation of this Standard, the state supreme court of course implicitly found that any intervention on this basis was unjustified and improper.

ARGUMENT

THE DECISION BELOW IS CONSISTENT WITH WELL-ESTABLISHED PRECEDENT, NAMLY THAT WHERE A CONFLICT OF INTEREST EXISTS, THE DEFENDANT NEED NOT SHOW PREJUDICE, AND THE HARMLESS ERROR RULE IS INAPPLICABLE. SEEN IN ITS CORRECT LIGHT, THE DECISION BELOW PRESENTS MERELY A FACT-SPECIFIC CASE DEALING WITH THE CREATION OF A CONFLICT OF INTEREST DUE TO THREATS TO RESPONDENT'S ATTORNEY'S ECONOMIC AND PROFESSIONAL STATURE.

This court has long recognized that "(i)n certain Sixth Amendment contexts, prejudice is presumed." Strickland v. Washington, 80 L.Ed.2d 674, 696, 104 S.Ct. 2052 (1984). Such instances include "various kinds of state interference with counsel's assistance." Id. Another is a conflict of interest. Id. No burden of showing prejudice is imposed on the defendant in such contexts.

In the first instance, petitioners drastically misrepresent the holding (as discussed below), and fail to acknowledge that this case involves only the mundane issue of a conflict of interest in a discrete, non-recurring factual context. There can be no doubt on this point; the Seventh

Circuit explicitly and repeatedly noted the existence of a conflict. For example:

> [Clark] had a conflict of interest, not between two clients having conflicting defenses but between his client and himself. They had conflicting incentives -- Walberg to get off by any means, Clark to preserve so far as possible his relationship with a judge who regarded himself, apparently with some basis, as Clark's benefactor.

766 F.2d at 1074-1075.

> The judge . . . went far. He accused Clark of ingratitude; he made a thinly veiled threat not to approve Clark's fee request at the end of the trial; he reminded Clark of Clark's dependence on his good will. The circumstances made the conflict of interest between Clark and his client too serious to be excused just because Walberg cannot show what more Clark would have done in Walberg's defense.

Id., at 1075.

Petitioners do not claim that further review is necessary to refine the law on conflicts of interest. Yet, this case involves nothing if not a conflict of interest, and petitioners' failure to grasp that fact makes their petition largely irrelevant.

Properly framed, the issue herein is really whether, under the peculiar facts at hand, the Seventh Circuit correctly perceived a conflict. Yet, framed in this way, the issue is revealed for the thoroughly factbound case that it is.

However, petitioners repeatedly contend that the decision "creates a new per se standard" for evaluating Sixth Amendment claims, namely "governmental rectitude." Petitioners have simply manufactured this standard, inasmuch as the phrase "governmental rectitude" appears nowhere in the opinion, wasn't asserted by respondent Walberg at any time, and indeed has nothing to do with the holding.

Having constructed this false issue, petitioners use it as a foundation for their second-tier argument: that the

decision allegedly employs a Fourth Amendment exclusionary rule analysis; the defendant may now go free under the Sixth Amendment simply because a magistrate has "blundered." E.g., Pet., pp. 17-21.

The phrase "governmental rectitude" has the advantage of piquancy, but suffers the disability of irrelevancy to the analysis utilized by the Seventh Circuit. Respondent wasn't granted relief merely due to some judicial "blunder." As noted above, relief was granted because the judge's malicious interference with the attorney-client relationship created a conflict of interest. Interference of that magnitude is a far cry from the blundering attendant some technical Fourth Amendment transgression.

The judge didn't merely "blunder," or suffer some small loss of "rectitude." Rather, as the Seventh Circuit noted:

> But Judge Seraphim went far beyond the bounds of permissible criticism of a lawyer's tactics when he accused Clark of personal ingratitude. And he implied, or could be understood to be implying that he was angry at the lawyer because the client was unworthy of the protracted efforts that the lawyer was making on his behalf. The judge's partiality at the suppression hearing, his bizarre conduct in answering questions put to Walberg before Walberg could answer, his insistence that the defendant's lawyer owed his first allegiance to the judge as a family friend and benefactor, his congratulating the jury on their speed, and the haste with which he imposed an exceedingly severe sentence, when taken all together, show that Judge Seraphim committed an egregious breach of judicial decorum.

766 F.2d at 1077.

The state supreme court found a violation in the code of judicial ethics due to this behavior. Judge Seraphim, it must be stressed, also threatened to blacklist defense counsel in local courts; threatened to limit payment of his bills in this case; threatened "to fix" counsel at trial; and told counsel he'd have to choose between a fair trial for respondent and his motion practice. To petitioners this behavior may smack

only of some technical violation, but the Seventh Circuit viewed the conduct with a more discerning, and less partisan eye, and came to a radically different conclusion.

As a related matter, petitioners also assert that "the Seventh Circuit's test requires reversal and a new trial simply because a judge exhibits inappropriate testiness." Pet., p. 19. Petitioners are probably the only observers who have characterized the judge's unethical behavior so euphemistically. Their view advances their claim that he merely blundered, but it is at odds with the facts. Nonetheless, this euphemism exposes the Achilles heel of petitioners' argument.

The case boils down to petitioners' disagreement with the Seventh Circuit as to how to characterize the judge's behavior. Was he merely testy, as petitioners assert, or did his unethical threats unlawfully interfere with the relationship between counsel and client so as to create a conflict of interest, as the Seventh Circuit held?

When all is said and done, the only real question is whether a conflict of interest was created. In turn, that question involves only a dispute as to factual characterizations, not one of broad-based legal principles.

Petitioners, it bears emphasis, have not sought review of the existence of a conflict of interest. Instead, petitioners claim only that "testy" or "blundering" judges don't obviate the need for showing prejudice.*/ But that isn't the real

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*/ Petitioners have not, for example, claimed that the Seventh Circuit employed an improper methodology in finding the conflict, or that the decision goes astray from other conflict cases. Petitioners instead, somewhat inexplicably and intransigently, don't even acknowledge that the court found a conflict. Rather, petitioners assert only that mere judicial testiness or blundering isn't enough to relieve the defendant of the burden of proving prejudice--an assertion that is in no way inconsistent with the decision below.

question, which is whether, under the nonrecurrent facts at hand, the judge's vituperative threats to counsel's economic and professional stature, created a conflict of interest. This question of course, hardly involves novel issues of law.

Certain other matters raised by petitioners deserve but passing response. Petitioners claim that the lower court's failure to apply a harmless error analysis is a serious departure from prior decisions by this Court. Pet., pp. 22-24. However, this contention stems from petitioners unwillingness to accept the Seventh Circuit's finding of a conflict of interest.

It is beyond dispute that the existence of a conflict obviates the need to show prejudice. E.g., Holloway v. Arkansas, 435 U.S. 475 (1978). Petitioners note that Holloway involved an objected-to conflict, but that fact doesn't render the case distinguishable; the lower court here found an actual conflict of interest, which certainly places the case on the same footing as an objected-to conflict.

Of course, when a conflict is found, the harmless error rule is inapplicable, in part "because of what [the conflict] tends to prevent the attorney from doing . . . . [T]he evil--it bears repeating--is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process . . . . And to assess the impact of a conflict of interests on the attorneys options, tactics, and decisions, in plea negotiations would be virtually impossible." Holloway, 435 U.S. at 488, 489, 490.

This passage also addresses petitioners' false concern about "a rule of . . . per se harm flowing from error arising only at pretrial stages." Pet., p. 18. Clearly, a conflict arising at a pretrial stage infects later proceedings, as the quote above from Holloway amply demonstrates.

II. THE DECISION BELOW CAN BE AFFIRMED ON INDEPENDENT BASES, THUS MAKING IT INAPPROPRIATE FOR CERTIORARI ON THE ISSUES RAISED BY PETITIONERS.

The decision below can be affirmed on an independent ground--namely that there was an objected-to conflict of interest. As noted above, the Seventh Circuit found the existence of an actual conflict. However, respondent also argued below that his attorney had objected to the conflict, and the failure to take ameliorative action in the face of the objection warranted habeas relief. The Seventh Circuit found it unnecessary to reach this argument, given its conclusion of an actual conflict, but nontheless the court implied agreement with it:

> Clark moved to recuse Judge Seraphim on the ground that "if this case should proceed with Judge Seraphim presiding defendant will be denied the effective assistance of counsel"; and with the judge thus alerted to the conflict, maybe his refusal to recuse himself was reversible error even if harmless, under the cases we have cited. But there is no need to pursue this approach further; . . . .

766 F.2d at 1075-1076.

There can be no dispute that, where no action is taken on a conflict-based objection, the harmless error rule is inapplicable. Holloway. In this context, it is unimportant "whether the alleged conflict actually existed." Rather, the trial court's failure to resolve the conflict is itself "error [which] unconstitutionally endanger[s] the right to counsel." Cuyler v. Sullivan, 446 U.S. 335, 345 (1980). Thus:

> A constitutional violation occurs, and proof of an actual conflict is not required, when a defendant's attorney objects to joint representation and the trial court overrules the objection without exploring the basis of the objection or the adequacy of the representaion in the face of a potential conflict of interest . . . . Absent an inquiry by the trial judge that reveals the objection to be specious, the objection itself is sufficient evidence that an actual conflict of interest affected counsel's performance.

Wilson v. Moran, 774 F.2d 591, 593, 594 (7th Cir. 1984, en banc). Accord, Zembowski v. Roberts, 771 F.2d 1057 (7th Cir. 1985).

As noted above, Clark asked Judge Seraphim to recuse himself after the final threat (to "fix" Clark at trial). Respondent contends that this motion was sufficient to alert Judge Seraphim to the possibility of a conflict--namely that Clark felt that his representation of Walberg was being interfered with by the judge.

The case thus reduces to a thoroughly pedestrian issue: whether Clark sufficiently lodged a conflict-based objection so as to bring respondent within the ambit of Holloway. The record clearly supports a positive answer, but that's not even really the point; the issue isn't novel, indeed, to the contrary, it is dependent only on the application of well-settled law to particular facts.

Further, the decision below can be affirmed on the ground that Walberg's fourteenth amendment right to an unbiased magistrate was denied by Judge Seraphim's failure to recuse himself. The Seventh Circuit, while not reaching this issue, did note: "It is possible but less certain that Walberg was also deprived of a far older right than the right to the effective assistance of counsel--the right to an unbiased judge." 766 F.2d at 1076.

The facts have been thoroughly discussed, and they speak for themselves. Walberg's point is simply that the decision below can be affirmed on the theory of denial of an unbiased judge, and that this Court should not utilize its resources to discuss such a well-settled theory.

CONCLUSION

For the reasons discussed above, the petition for writ of certiorari should be denied.

Date: October 25, 1985.

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